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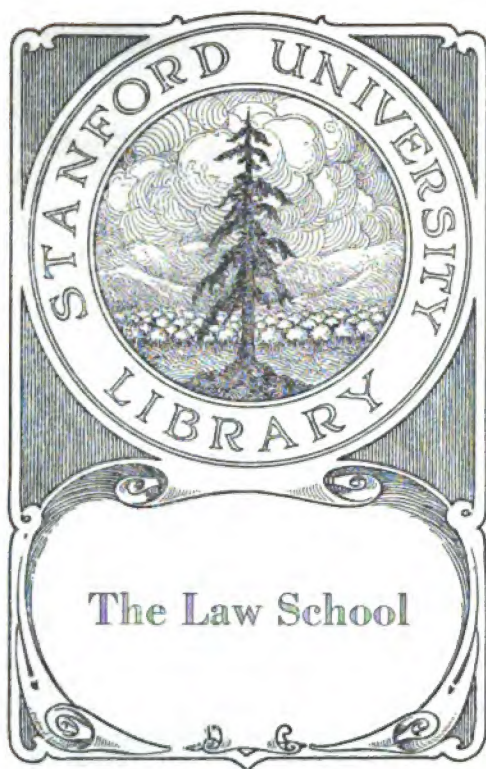
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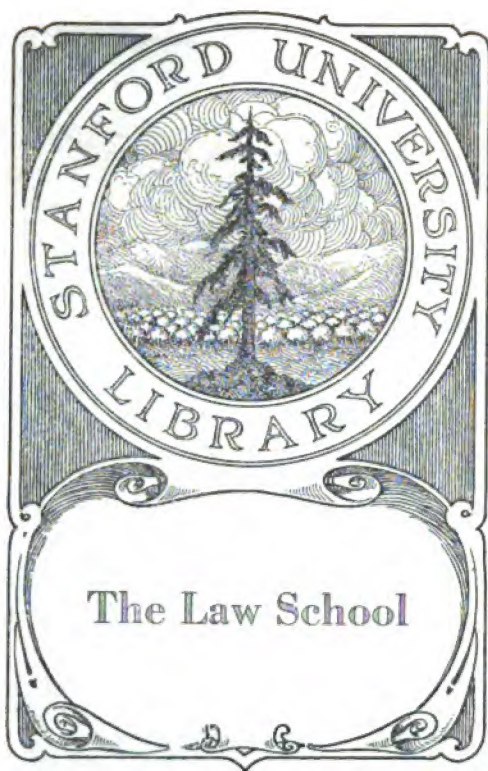
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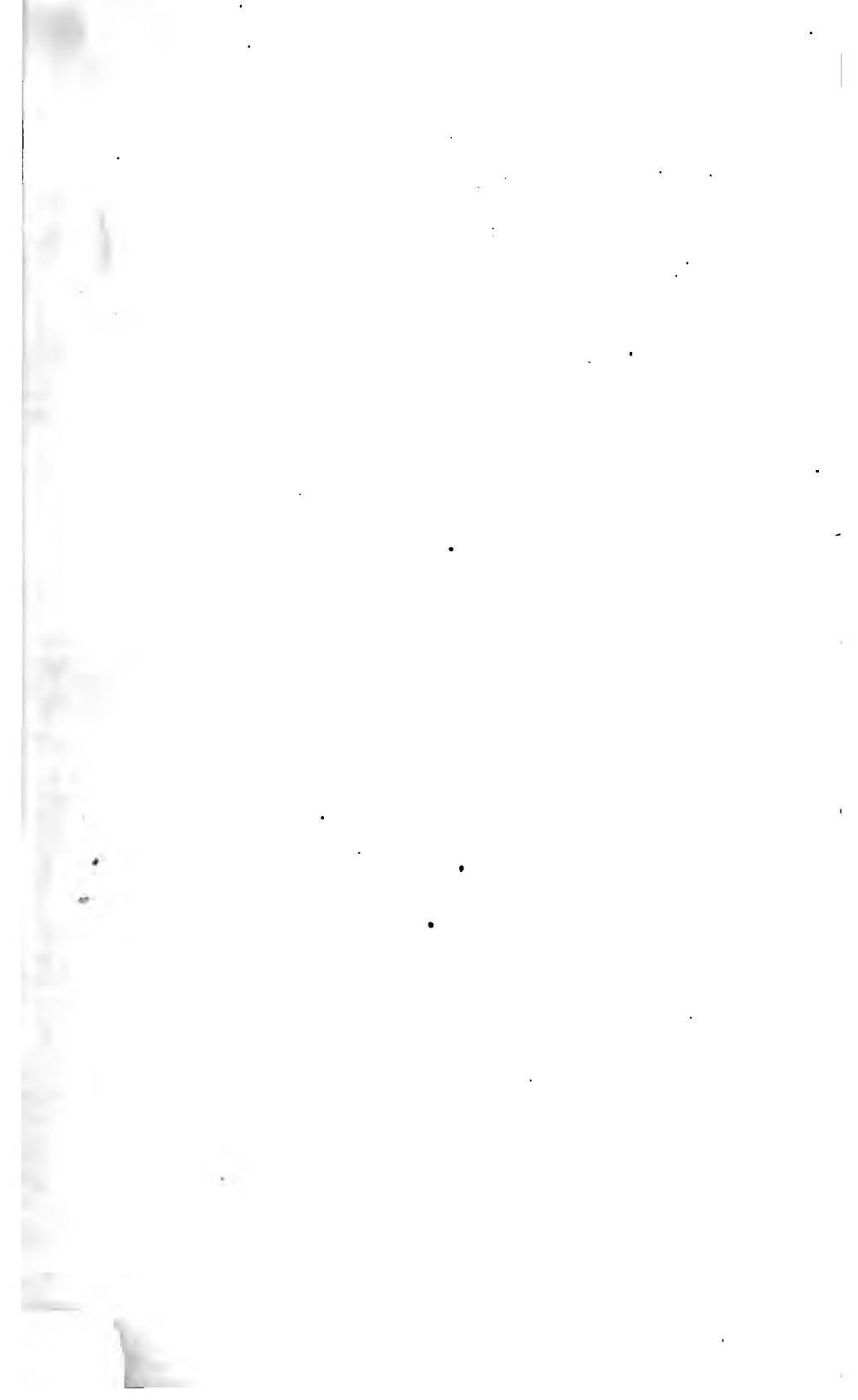
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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

English Courts of Common Law.

WITH

TABLES OF THE CASES AND PRINCIPAL MATTERS.

HERETOFORE CONDENSED BY

HON. THOMAS SERGEANT AND HON. THOMAS M'KEAN PETTIT,

Now Reprinted in Full.

Millar's
VOL. XXXVI.

CONTAINING

CASES IN THE COMMON PLEAS, AND EXCHEQUER CHAMBER, FROM EASTER TERM, 6 WILLIAM 4, 1836, TO EASTER TERM, 7 WILLIAM 4, 1837, BOTH INCLUSIVE; AND CASES IN THE KING'S BENCH, QUEEN'S BENCH, AND EXCHEQUER CHAMBER, FROM TRINITY TERM, 5 WILLIAM 4, 1835, TO HILARY TERM, AND VACATION, 2 VICTORIA, 1839, INCLUSIVE.


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BY

JOHN LEYCESTER ADOLPHUS, OF THE INNER TEMPLE,

AND

THOMAS FLOWER ELLIS, OF THE MIDDLE TEMPLE,

ESQRS., BARRISTERS AT LAW.

VOL. IX.

CONTAINING THE CASE OF STOCKDALE v. HANSARD, AND THE CASES OF
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The cases in 1 Nevile and Perry, not reported in this volume, are to be found in the 31 and 33 E. C. L. Reports, as reported by Adolphus and Ellis.

JUDGES

OF

THE COURT OF QUEEN'S BENCH,

DURING THE PERIOD OF THESE REPORTS.

The Right Hon. THOMAS Lord DENMAN, C. J.

Sir JOSEPH LITTLEDALE, Knt.

Sir JOHN PATTESON, Knt.

Sir JOHN WILLIAMS, Knt.

Sir JOHN TAYLOR COLERIDGE, Knt.

ATTORNEY-GENERAL.

Sir JOHN CAMPBELL, Knt.

SOLICITOR-GENERAL.

Sir ROBERT MOUNSEY ROLFE, Knt.

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During some part of the period comprised in this volume the Reporters have been favoured with the assistance of *Edward Smirke*, of the Middle Temple, Esquire, Barrister-at-Law. The cases reported by Mr. *Smirke* are pointed out as they occur.

CASE
 OF
STOCKDALE AGAINST HANSARD,
DETERMINED
 IN THE
COURT OF QUEEN'S BENCH,
 IN
Trinity Term,
 In the Second Year of the Reign of Victoria.—1839.

Willis

**JOHN JOSEPH STOCKDALE v. JAMES HANSARD, LUKE
 GRAVES HANSARD, LUKE JAMES HANSARD, and LUKE
 HENRY HANSARD. (a)—p. 1.**

It is no defence in law to an action for publishing a libel, that the defamatory matter is part of a document which was, by order of the House of Commons, laid before the House, and thereupon became part of the proceedings of the House, and which was afterwards, by orders of the House, printed and published by defendant; and that the House of Commons heretofore resolved, declared, and adjudged "that the power of publishing such of its reports, votes, and proceedings as it shall deem necessary or conducive to the public interests, is an essential incident to the constitutional functions of parliament, more especially to the Commons' House of Parliament as the representative portion of it."

On demurrer to a plea suggesting such a defence, a court of law is competent to determine whether or not the House of Commons has such privilege as will support the plea.

CASE. The declaration (May 30th, 1837) stated that, before and at the time of committing the grievance next hereinafter complained of, the said plaintiff was, and for a long time had been, a bookseller and publisher of books, and as such bookseller and publisher of books, had published divers and very many scientific books, and particularly, in the year 1827, a certain physiological and anatomical book written by a learned physician on the generative system, illustrated by anatomical plates: and, whereas the said defendants, on the 1st May, 1836, did publish and cause to be published in a certain book, purporting to be "Reports of the Inspectors of the Prisons of Great Britain," the passage following, that is to say: "This last is a book" (meaning the said physiological and anatomical book) "of a most disgusting nature, and the plates are indecent and obscene in the extreme;" whereas, in truth and in fact, the said book is purely of a scientific character: Yet the said defendants, well knowing the premises, but contriving and maliciously

(a) This case, on account of its importance, has been placed out of its order, for the purpose of early publication.

intending to defame and injure the said plaintiff in his said trade of a bookseller and publisher, and cause it to be believed that he published indecent and obscene books, on 19th August, A. D. 1836, maliciously and falsely did publish, and cause to be published, ~~of and~~ concerning the said plaintiff, in his said trade and business, in a certain printed paper, purporting to be a copy of the Reply of the Inspectors of Prisons for the Home District, with regard to the Report of the Court of Aldermen, to whom it was referred to consider the first report of the inspectors of prisons as far as relates to the gaol of Newgate, which said copy of the reply purports to be a letter from William Crawford and Whitworth Russell, Esquires, inspectors of prisons for the Home District, to the right honourable Lord John Russell, &c., the false, scandalous, and defamatory libel, following, that is to say,—"But we deny that that book is a scientific work (using that term in its ordinary acceptation), or that the plates are purely anatomical, calculated only to attract the attention of persons connected with surgical science; and we adhere to the terms which we have already employed, as those only by which to characterise such a book" (meaning thereby that the said book was disgusting and obscene, as stated in the above-mentioned report of the inspectors of prisons of Great Britain): and, in another part of the said libel, to the substance and effect following, that is to say: "We also applied to several medical booksellers, who all gave it the same character. They described it as one of Stockdale's obscene books" (meaning thereby that the plaintiff was a common publisher of obscene books); "that it never was considered as a scientific work; that it never was written for or bought by the members of the profession as such; that it was intended to take young men in, by inducing them to give an exorbitant price for an indecent work:" To the great injury of the said plaintiff in his said trade and business, and also of his fair fame and reputation, and to the damage of the said plaintiff of 5000*l.*" &c.

Plea (of July 6th, 1837.) That, heretofore and before the commencement of this suit, and after the making of a certain act of parliament, made and passed at the parliament begun and holden at Westminster on 19th February, 1835, entitled, "An act for effecting greater uniformity of practice in the government of the several prisons in England and Wales; and for appointing inspectors of prisons in Great Britain, (Stat. 5 & 6 W. 4, c. 38,) to wit on 1st January, A. D. 1836, the right honourable John Russell (commonly called the right honourable Lord John Russell), then being one of his late majesty's principal secretaries of state, in pursuance of the said act, nominated and appointed William Crawford, Esquire, and the Rev. Whitworth Russell to visit and inspect, either singly or together with any other inspector or inspectors appointed under the provisions of the said act, every gaol, bridewell, house of correction, penitentiary, or other prison or place kept for the confinement of prisoners in any part of Great Britain: and that afterwards, viz. on the 1st March in the year aforesaid, they, the said William Crawford and Whitworth Russell, as such inspectors as aforesaid, made their report in writing of the state of a certain gaol and prison in the city of London called Newgate, and transmitted the same to the said right honourable John Russell (commonly called, &c.), then being such secretary of state as aforesaid, in pursuance of the said act of parliament. And that heretofore, and before the publication of the said supposed libel in the declaration mentioned, viz. on 13th August, A. D. 1835, a parliament of our

sovereign lord his late majesty King William IV. was holden at Westminster in the county aforesaid; and it was in and by the Commons' House of the said parliament then, to wit on the day and year last aforesaid, resolved and ordered that the parliamentary papers and reports printed for the use of the house should be rendered accessible to the public by purchase at the lowest price at which they could be furnished, and that a sufficient number of extra copies should be printed for that purpose: And that afterwards, at a parliament of our late said lord the king, holden at Westminster in the year 1836, and before the publication of the said supposed libel in the said declaration mentioned, viz. on 9th February, 1836, it was ordered by the said Commons' House of Parliament that a select committee should be appointed to assist Mr. Speaker in all matters which related to the printing executed by order of the house: And that afterwards, and before the publication of the said supposed libel, viz. on the day and year last aforesaid, a select committee was duly appointed by the said house, in pursuance of the said last-mentioned order, for the purposes in the said order mentioned: And that afterwards, and before the publication of the said supposed libel, and whilst the said last-mentioned parliament was so sitting as aforesaid, viz. on 18th March in the year last aforesaid, it was resolved by the said committee, appointed in pursuance of the said last-mentioned order of the said house, (amongst other things) that the parliamentary papers and reports printed by order of the house should be sold to the public at certain specified rates, and that Messrs. Hansard (meaning the said defendants), the printers of the house, be appointed to conduct the sale thereof: And that afterwards, and before the said publication of the said supposed libel, and whilst the said last-mentioned parliament was sitting, viz. on 18th March in the year last aforesaid, a copy of the said report of the said William Crawford and Whitworth Russell, so being inspectors of prisons as aforesaid, was laid before the said Commons' House of Parliament, pursuant to the directions of the said act of parliament: And that afterwards, and before the publication of the said supposed libel, and whilst the said parliament was so sitting as aforesaid, viz. on 22d March in the year last aforesaid, it was in and by the said Commons' House of Parliament ordered that the said report of the inspectors of prisons should be printed: Whereupon the said defendants, then being printers employed for that purpose by the said house, did afterwards, to wit on the day and year last aforesaid, in pursuance of the said orders and resolutions, print and publish the said report: And that afterwards, and during the sitting of the said last-mentioned parliament, and before the publication of the said supposed libel, viz. on 5th July 1836, it was ordered, by the said Commons' House of Parliament, that there should be laid before that house a copy of a report made, on the 2d July 1836, by a committee of the Court of Aldermen to that court, upon the said report of the said inspectors of prisons in relation to the gaol of Newgate: And that, in pursuance of the said last-mentioned order, the said report made on 2d July 1836 was laid before the said Commons' House of Parliament, and was thereupon then ordered by the said Commons' House of Parliament to be printed: and that afterwards, viz. on 22d July in the year aforesaid, they, the said W. Crawford and W. Russell, so being such inspectors as aforesaid, transmitted to the said right honourable John Russell (commonly called, &c.), then being one of his late majesty's principal secretaries of state as aforesaid, a certain reply in writing of them the

said W. Crawford and W. Russell, as such inspectors as aforesaid, with regard to the said report of the said court of Aldermen mentioned in the said last-mentioned order of the said Commons' House of Parliament; and afterwards, and before the publication of the said supposed libel, viz. on 25th July in the year aforesaid, a copy of the said reply of the said inspectors of prisons for the home district, with regard to the said report of the said committee of aldermen, was, in pursuance of an order of the said Commons' House of Parliament for that purpose made on the day and year last aforesaid, presented to and laid before the said house; and thereupon the same then became and was part of the proceedings of the said Commons' House of Parliament: And it was afterwards, and before the publication of the said supposed libel, and during the sitting of the said last-mentioned parliament, viz. on 26th July in the year last aforesaid, ordered by the said Commons' House of Parliament that the said reply of the said inspectors should be printed: Whereupon the said defendants, so being printers as aforesaid, and employed for that purpose, did, by the authority of the said Commons' House of Parliament, and in pursuance of the said orders and resolutions of the said Commons' House of Parliament, print the said reply of the said inspectors of prisons, as directed and required by the said orders and resolutions of the said house, and did publish the same by the authority of the said Commons' House of Parliament, and as directed and authorised by the said orders and resolutions, and not otherwise howsoever, as it was lawful for them to do for the cause aforesaid: And the said defendants further say that the said report and the said reply, which the said defendants so printed and published as in this plea mentioned, are the same report and reply as are mentioned in the said declaration, and that the said matter in the said declaration charged as libellous is contained in the said report and reply in this plea mentioned, and that the publishing the same matter, as charged in the said declaration, is the same publishing as in this plea mentioned, and not other and different, and that the said defendants did not ever publish the said libellous matter in the said declaration mentioned otherwise or on any other occasion than as in this plea mentioned: And the said defendants further say, that the said Commons' House of Parliament heretofore, viz. on 31st May in the year last aforesaid resolved, declared, and adjudged that the power of publishing such of its reports, votes, and proceedings as it shall deem necessary or conducive to the public interests is an essential incident to the constitutional functions of parliament, more especially to the Commons' House of Parliament as the representative portion of it. Verification.

Demurrer (July 8th, 1837), assigning for causes: That the known and established laws of the land cannot be superseded, suspended, or altered by any resolution or order of the House of Commons; and that the House of Commons, in parliament assembled, cannot, by any resolution or order of themselves, create any new privilege to themselves inconsistent with the known laws of the land; and that, if such power be assumed by them, there can be no reasonable security for the life, liberty, property, or character of the subjects of this realm.

The demurrer was argued in Easter term, April 23d, 24th, and 25th, and Trinity term, May 28th, 1839.

Curwood, for the plaintiff.

Upon these pleadings the questions are:—Has the party a right to sue for the injury complained of? Can that right be abridged by any

authority but that of the legislature? Has the House of Commons the right to assume that authority, and to be the sole judge of its existence and extent? The house rests its claim on what is termed the "law of parliament;" but there is a fallacy in asserting the privilege of either house to be alone the law of parliament. *Thorp's Case*, 5 Rotuli Parliamentorum, 239, (cited, 1 Hatsell's Precedents, 28, 3d ed. See Coke's 4th Institute, 15; 14 East, 25,) has been usually cited in support of this claim of exclusive cognizance; but the *dictum* attributed to the judges in that case, as to the privileges of parliament, is correct only when applied to the whole parliament, and not to each separate branch of it. It must be referred to a period when the king, lords, and commons constituted the supreme court of judicature, and the distinction of houses was imperfectly marked. At this day the functions of each branch of the legislature are defined; and it is clear that neither the king alone, nor either house separately, can make or declare law. The inconvenience of a different state of things is evident. Each house might make contradictory declarations of law, and each declaration would equally be the "law of parliament." The resolutions of the House of Commons are relied upon in the plea; but, if such resolutions could make law, the legislative, judicial, and executive powers of the state would soon be absorbed by that house. The authorities are for the most part collected in Mr. Pemberton's pamphlet, (a) and in the argument of HOLROYD, J. in *Burdett v. Abbot*, 14 East, 11, et seq. A few will be sufficient to show that the courts of law have, from a very early period, taken upon themselves to decide and to declare the law as to parliamentary privilege. One of the earliest cases is that of *Donne v. Walsh*, 1 Hatsell's Precedents, 41, (citing Prynne's Register of Parliamentary Writs, part 4, p. 752,) 12 Ed. 4, in which the Court of Exchequer determined that the servant of an earl was entitled to be discharged from arrest during the sitting of parliament, but was not exempt from being sued, although the writ of privilege produced by the defendant to the barons of the exchequer claimed immunity in both respects. (b) The privileges of the house are as much a part of the law of the land as the statute, ecclesiastical, or admiralty law, all of which must be noticed and determined by the courts of common law, when brought before them in the ordinary course of justice. *Barnardiston v. Soame*, 6 Howell's State Trials, 1063 (S. C. 2 Levinz, 114; Freeman, (K. B. & C. P.) 380, 387, 390, 430.) and *Benyon v. Evelyn*, Reports of Sir O. Bridgman's Judgments, 324, are also decisive authorities. In the former case, a court of law undertook to adjudicate on a double return at an election of members, although exclusive cognizance of such matters was claimed for the House of Commons (c). In the latter, Sir O. Bridgman decided that members of the House of Commons were liable to be sued during a sitting of parliament, although it was said that a committee of the house had voted in favour of their exemption. *Rex v. Wright*, 8 Term Rep.

(a) "A letter to Lord Langdale on the recent proceedings in the House of Commons on the subject of privilege, by Thomas Pemberton, M. P." 1837. See also "Remarks on a report from a select committee of the late House of Commons on the publication of printed papers;" by P. A. Pickering, M. A., 1838.

(b) "Arrestari minime debeant, imprisonari, aut implacitari." Prynne says, in a marginal note on the last two words, "This was a new clause and privilege."

(c) The judgment was reversed on error in the Exchequer Chamber, and the judgment of the Exchequer Chamber was affirmed in the House of Lords, 6 How. Sta. Tri. p. 1117. But see *Myddellon Wynn*, Willes 605, 606.

293, will be relied upon, where Lord Kenyon is reported to have said that it was impossible to admit the proceeding of either house to be a libel, and that this court would not inquire into it. That case was an application to the discretion of the court for leave to file a criminal information against a person who had printed a correct copy of a report of the House of Commons. The court refused, in their discretion, to grant it, and properly; but it does not follow that every *dictum* attributed to the court in giving judgment is to be accepted as sound law. The language there used is, in fact, at variance with the later authority of Lord ELLENBOROUGH, in *Burdett v. Abbot*, 14 East, 128, who distinctly reserves the right of the courts to inquire into the proceedings of the house in the supposed case of an extravagant and unwarrantable assumption of power. The case of Sir W. Williams, 13 How. Sta. Tri. 1369, might be quoted, in which the speaker was convicted and fined for the publication of Dangerfield's narrative under the sanction of the House of Commons; but it cannot be denied that the precedent is too exceptionable to be relied on (a).

As to the plaintiff's right to sue, the present case is stronger than that of *Ashby v. White*, 14 How. Sta. Tri. 695; (S. C. 2 Ld. Raymond, 938.) In that case there was some pretence for a claim of exclusive cognizance by the house, for it was not disputed that the house has exclusive right to judge of the validity of elections to serve in parliament: but the House of Lords decided, upon a writ of error, that the right of suffrage was a franchise, for the disturbance of which the voter was entitled to a common law remedy, and was not constrained to seek redress only by application to the House of Commons.

Then, supposing the courts of law to have cognizance of the privileges of parliament, the question in this case is, whether the house of Commons has the privilege of enabling individuals to publish for general sale and circulation whatever that house pleases with impunity? The first proof of the exercise of this privilege is found in 1641, (b) a very suspicious period for its commencement. Popular ferment ran high, and parties in the state were preparing to appeal to force. From that period downwards, the journals of the House of Commons contain numerous entries, by which it appears that ridiculous, illegal, and tyrannical privileges have been asserted by that house. A mere enumeration of them, for the period of about a century after the restoration, is enough to show the degree of weight that should be attached to the orders of the house on such subjects, as entered on its journals, and the mischief of leaving it to be the sole judge of the existence and limits of its privilege. The most trifling civil injuries to members, even trespasses committed upon their servants, though on occasions unconnected with the discharge of any parliamentary duty, have been repeatedly the subject of inquiry under the head of privilege (c). If the declaration of the house is to establish the existence of

(a) Proceedings were taken in order to a reversal of the judgment upon the revolution, but it does not appear to have been actually reversed. See the observations of Mr. Wynn, 13 How. Sta. Tri. 1438.

(b) See the "Report from the Select Committee" (of the House of Commons) "on the publication of printed papers" (May 8th, 1837), p. 3, and (Appendix) p. 19.

(c) The following is the result of the cases, as it was stated in the argument.

Cases voted breaches of privilege, between the Restoration and 1697. (The number of cases, not the number of persons, was stated.)

Delivering ejectments to members of parliament	15
Serving process on members of parliament	5

such privileges, and the house itself is exclusively to adjudicate upon them, the authority of the law is superseded.

In the case of *Mr. Long Wellesley*, 2 Russell & Mylne, 639, the Lord Chancellor (Lord Brougham) committed a member of the House of Commons (then sitting) for a contempt of court, and refused to allow his claim

	Cases
Serving them with subpoenas (probably subpoenas out of Chancery)	16
Entering on their estates	24
Entering the mines of a member of parliament	1
Pulling down a scaffold at Mr. Bertie's	1
Detaining the goods of members of parliament	13
Impounding their cattle	3
Lopping Mr. Scawen's trees	1
Serving the tenants of members of parliament with ejectments	16

During the same period persons were ordered into custody in the following cases.

For delivering ejectments to members of parliament	7
Serving subpoenas on them	12
Entering on their estates ..	5
Entering the mines of a member of parliament	1
Pulling down a scaffold (Mr. Bertie's) ..	1
Detaining the goods of members of parliament	10
Stopping up their lanes	2
Driving their cattle	2
Cutting down trees of a member of parliament	1
Entering on estates	3
Arresting the servants of members of parliament	49
Serving ejectments on tenants of members of parliament	4
Seizing the cattle of a tenant of a member of parliament	1
Serving the tenant of a member of parliament with process	1

From 1697 to 1714, the following cases of breach of privilege occur.

By delivery of declarations in ejectment to members of parliament	2
Entering their lands, &c.	9
Serving ejectments on their tenants	3

Under the date of 1606, a person named Bigland is voted guilty of a breach of privilege, in taking the horse of Mr. James (the member for Bristol) from an inn stable, and riding it post, (*Con. Jour.* vol. i. p. 352.)

In 1700, Rogers, an attorney, was committed for breach of privilege, in sending an exorbitant bill of costs to the Gunners at Portsmouth, (*Id.* vol. xxi. p. 116.)

From the year 1714 to 1761, the following instances occur.

Ejectments against members	4
Injuries to their property	51

Among the latter are the following.

In the year 172d. Digging Lord Gage's coal, (<i>Id.</i> vol. xiii. p. 313.)	
1729. Ploughing Mr. Bowles's land, (<i>Id.</i> vol. xxi. p. 511.)	
1733. Digging Sir Robert Grosvenor's lead, (<i>Id.</i> vol. xxii. p. 102.)	
1739. Killing Lord Galway's rabbits, (<i>Id.</i> vol. xxiii. p. 505.)	
1742. Assaulting Sir Watkin Williams Wynn's porter, in Downing street, (<i>Id.</i> vol. xxiv. p. 391.)	
1753. Fishing in Mr. Joliffe's pond, (<i>Id.</i> vol. xxvi. p. 698.)	
1753. Entering upon Admiral Griffin's fishery, (<i>Id.</i> vol. xxviii. pp. 489, 545.)	
1759. Taking fish from Sir John Glynne's water, (<i>Id.</i> vol. xxviii. p. 598.)	
1756. Erecting a building, posts, and rails, on Sir Cordel Firebrace's waste in Suffolk, (<i>Id.</i> vol. xxvii. p. 636.)	
1760. Digging in Earl Verney's ground, and carrying away a tree, (<i>Id.</i> vol. xxviii. p. 915.)	

During the same period are the following cases of privilege.

Ejectments served on the servants of members of parliament	3
Serving legal process on the servants of members of parliament	9

Under the date of March 16th, 1760, is the following entry, (*Id.* vol. xxviii. p. 1107).

"Resolved, that it is the opinion of this committee, that Sir Richard Perrot, having entered into possession of a cellar, in the occupation of a tenant of Charles Fitzroy Scudamore, Esquire, a member of this house, is thereby guilty of a breach of the privilege of this house.—Ordered, that the said Sir Richard Perrot be, for his said breach of privilege, taken into the custody of the serjeant-at-arms attending this house."

of privilege. In disregarding the claim, he must necessarily have taken upon himself to determine the nature and extent of the privileges of the house. If it be asked why the exercises of these privileges has been so frequently suffered without calling them in question in the ordinary courts of justice, it may be answered that the power of the body which sought to enforce them has been too formidable to be discreetly or safely resisted; and that the long continuance of a bad usage is not decisive of its legality; for the use of secret torture is shown (a) to have prevailed in this country during the very period when its practice was disclaimed by the courts of law, and denounced by the greatest lawyers. (a) Irregular practices and undefined claims of privilege grow up in unsettled times; and they pass unresisted until some suitable occasion arises for submitting them to examination, when they are found to be unwarrantable, and are extinguished.

Sir J. Campbell, Attorney-General, *contra*.

The House of Commons is called before an inferior tribunal for authorizing a publication which it thought beneficial to the community, and essential to the discharge of its legislative functions. The right to do so is an ancient privilege recognized by legislative declarations, and never questioned, since the Revolution, except by the plaintiff. The assertion of that right is a claim of free intercourse between members of the house and their constituents, advanced solely for the public benefit, and it is, in a peculiar manner, one of those "Rights and Privileges of Parliament" described in the remonstrance of both houses to Charles I. (December, 1641, 2 Parl. Hist. 978,) as "the birthright and inheritance, not only of themselves, but of the whole kingdom."

The House of Commons has directed the defendant to appear and plead to this action; but it does not thereby submit its privileges to the decision of this Court, or of any other tribunal than itself. The only object of the pleading is to inform the court, in a regular way, that the act complained of was done in exercise of its authority and in the legitimate use of its privileges. The fact that it was so done is admitted by the demurrer; and nothing remains for this court but to give judgment for the defendants. Another and a summary remedy might have been adopted; but the house, having confidence in the tribunals of the country, deems it expedient to refer the case to the consideration of the court in the ordinary course of justice, thereby giving to the plaintiff an opportunity either of denying that the act was done under the alleged authority, or of showing that the authority has been exceeded.

That the publication is criminatory cannot be denied; nor that the declaration shows a good ground of action: but this is not a libel; a libel is a criminatory writing published without just occasion or authority. Where the occasion justifies the publication, as in the case of a publication for the use of members, or an answer to inquiries respecting the character of a servant, it is no libel, and any consequential loss to the party is *damnum absque injuria*. Then, as to the plea, it is in bar, and not to the jurisdiction. The latter is applicable only where the subject of complaint is *alieni fori*, to which *forum* the plaintiff is referred for the proper remedy. Here, where the court has jurisdiction over the subject matter of the action, as disclosed in the declaration, a plea in bar, and

(a) He cited Jardine's Reading on the Use of Torture, 1837.

not to the jurisdiction, is proper; *Rex v. Johnson*, 6 East, 593. (a) There is no other court to which the plaintiff can be referred for redress; the publication furnishes no ground of complaint any where or in any court. Suppose in an action of trespass the defendant pleaded a commitment by the house for prevarication, or for non-attendance on due summons, or for an assault on a member in the house, or the speaker in the chair; would it be competent to this court, upon such a plea, to inquire whether any privilege to commit existed? Yet, if this demurrer is to prevail, there is no tribunal before which the nicest question of privilege may not be discussed.

The plea refers to stat. 5 & 6 W. 4, c. 38, s. 7, which requires an annual report to be made by the inspectors of prisons to the secretary of state, and a copy of the report to be laid before both houses. The object of this latter provision was to ensure publicity. The plea states the due appointment of inspectors; the resolutions and orders of the house with respect to the publication and sale of papers; the several reports of the inspectors and of the Court of Aldermen, and the order of the house to print the reports; and it concludes by setting out the resolution of the house, that the power of publishing its reports, &c., is an essential incident to its functions. All this is admitted by the demurrer, which assigns for special causes a series of truisms. It is objected that the house cannot alone supersede, suspend, or alter the law of the land. No such power is claimed. The house only claims a right to declare and explain the law of the land respecting its own privilege. In doing so, it no more alters or makes law than this court does when it declares the common law in the ordinary course. The house does not claim the power to create a new privilege by its own authority.

The points insisted upon by the defendants, are these:—

First. The alleged grievance arises from an act done by the House of Commons, in the exercise of a privilege claimed by them. The question of privilege, therefore, arises directly; and this court cannot inquire into the existence of the privilege, but must give judgment for the defendants.

Secondly. Even, if the question arose incidentally, still, on this record, the court could not inquire into the existence of the privilege, but must give judgment for the defendants.

Thirdly. The privilege (assuming that the court could inquire into its existence) does exist.

I. As to the first point. The question of privilege here arises directly. The record shows a general order for publication, made by the House of Commons, which would include the publication of this reply. The case, therefore, is the same as if a particular order had been made on the occasion. There are various general orders made by the house, as, for instance, the sessional orders for arresting those who obstruct the avenues to the house; and if a person were taken into custody under one of these orders it would be the act of the Commons, as much as if a special order were made for the purpose.

The privilege of the house applies to two distinct matters: first, personal immunity, as the exemption from arrest claimed by members for themselves, and (until it was abolished by statute (b)) for their servants:

(a) As to the necessity of a confession and avoidance, see *Fairman v. Ives*, 5 Barn. & Ald. 612, (7 Eng. Com. Law Reps. 220); *Cotton v. Browne*, 3 A. & E. 312, (30 Eng. Com. Law Reps. 100); *Lillie v. Price*, 5 A. & E. 645, (31 Eng. Com. Law Reps. 404.)

(b) See stat. 10 G. 3, c. 50. Compare sect. 2 with stat. 12 & 13 W. 3, c. 3, s. 2; and stat. 11 G. 2, c. 24, s. 2.

Secondly, the powers exercised by the house collectively, such as those of summoning witnesses, calling for the production of papers, committing to custody, and that (which is not now disputed) of printing for the use of members. The privilege here in question is of the latter kind. The power is claimed for the public benefit, but ranges within the law of privilege. [Lord DENMAN, C. J. The word "privilege" is not used in this plea.] Nor, perhaps, did it occur in the pleadings in *Burdett v. Abbot*, 14 East, 1. And in the case of a commitment the return to a habeas corpus does not use the term "privilege," but sets out matter showing that the act is done by the house in exercise of the powers belonging to it. The present case stands as if there had been a formal order for publishing the papers in question, with a preamble asserting the privilege, and the expediency of such publication.

The act, then, is an exercise of privilege; and it is within the general jurisdiction of the house, since they have a clear general right to print, and publish their proceedings. The demurrer admits that this document was published as a part of their proceedings: and it was, in fact, a part of them. A report, if adopted by the house, is clearly so. Had the inspectors of prisons been examined at the bar, their examination, if entered on the journals and in the votes, would have been a part of the proceedings. There might have been a debate in which this report and reply were read, and an order then made that they should be entered on the journals. Then they would clearly have been a part of the proceedings. And they are so here, the report having been laid before the house in pursuance of an act of parliament, and the reply by a vote, and the house having ordered both to be printed.

The question then is, whether an action lies against the defendants for publishing this reply under the authority of the house? The act is, in reality, a thing done in parliament; as when the house vote that a person shall be committed, and the speaker issues his warrant, and the vote is carried into execution. Setting aside privilege, who would be legally responsible for the act, it being done in parliament? The defendants are the servants of the house, obeying its order; if they are liable, where is a line to be drawn? The speaker, the members of the committee which superintended the publication, perhaps even the members of the house who voted for the publishing, would be likewise answerable.

But, where a question of privilege arises directly on the record, this court cannot inquire whether the privilege exists or not. Wherever the inquiry would be—whether the House of Commons, as a house of parliament, had power to do a particular act, the question is one of privilege; considering privilege, not merely as matter of personal immunity, but as comprehending the powers belonging to a house of parliament collectively. Here the question of privilege is directly raised, and cannot, therefore, be inquired into by a court of common law. As to the cases of *Donne v. Walsh* (a), *Benyon v. Evelyn*, Reports of Sir O. Bridgman's Judgments, 324, and *Barnardiston v. Soame*, 6 How. St. Tr. 1063,

(a) Prynne's Register of Parliamentary Writs, Part 4, p. 752, cited 1 Hats. Prec. 41. The Attorney General made his references to third edition of Hatsell's Precedents (1796), and that edition is cited throughout this report. There is, however, a fourth edition (1818), which does not always correspond in paging with the third. Vol. 1 contains, in addition to the former appendix, reports by committees of the House of Commons on the arrest of Lord Cochrane by the marshal of K. B. (see post), and on the case of Sir F. Burdett in 1810, and the authorities bearing upon it.

(and see the references, p. 17, ante), cited for the plaintiff; in the first two the question of privilege did not arise directly, but incidentally; in the last no question of privilege arose, and the house was no party to the proceedings. No case can be cited in which a court of common law has acted where the point of privilege arose directly, except *Rex v. Williams*, 13 How. St. Tr. 1370, which is admitted not to be an authority. The most frequent cases in which the privilege of the houses of parliament has come in question directly have been cases of habeas corpus on commitments by them; and there the courts of common law have disclaimed jurisdiction. So the question would arise directly if an action of trespass or false imprisonment were brought for such a commitment; and wherever it might be sought to overrule an act done by either house, and justified by its authority. The present is a case of that description. In *Birdett v. Abbot*, 14 East, 1, if the plaintiff had complained of the speaker's warrant as a libel, the case would have been precisely similar. If the complaint appears on the record to be made against an act of one of the houses, so that the court is called upon to say whether the privilege alleged in justification belongs to the house or is usurped, the point of privilege arises directly, whether raised by the declaration or by any subsequent pleading. It would arise so, for example, if the sheriff were sued for an escape, and pleaded that the defendant was elected a member of the House of Commons and was discharged by their order. With a question of privilege raised incidentally, the court must deal as it best can; as if, in an action of debt, the defendant pleads that he is a member, and privileged while the house sits; there no act or adjudication of the house is vouched, but there is merely a claim by an individual to be exempt from answering in the action. In such a case necessity may require that the existence of the privilege should be examined into; but the necessity which makes the rule point's out its limit. Where an act of either house is complained of, no such necessity can exist. There an adjudication has been made on the very point, and by a court of exclusive jurisdiction; and such an adjudication is binding.

The privilege of parliament appears to be looked at on the other side in the same light as the exemption of a witness from arrest, or the privilege of an attorney to be sued in his own court; rights upon which, no doubt, the courts of common law have power to adjudicate. But the power of adjudicating upon parliamentary privilege stands on a very different footing. The object of allowing such privilege to the House of Commons was, that it might be independent of the crown and of the House of Lords. For that purpose it is necessary that the house should be exclusively the judge of its own privilege.

The law of parliament differs from the common law, as do the laws administered in the equity, ecclesiastical and admiralty courts, with which laws the other courts do not profess to be conversant. It is not necessarily even a part of the law of England; for the parliament is not of England only, but likewise of Scotland and Ireland. This court, therefore, cannot take cognizance of it. If the court here could do so, a Scotch, or even a colonial court might adjudicate upon the law of parliament. In the latter case an appeal would lie to the privy council; so that the privileges of the House of Commons might come to be decided upon by the king and certain of his privy counsellors. And not only might the courts of Scotland or the colonies pronounce upon the law of parliament, but hundred courts and borough courts, and all others

throughout the country, of however low authority, might do so likewise.

The courts of law are subordinate to the houses of parliament; and that shows their incompetency to decide upon a question of parliamentary privilege directly arising. Originally, the Houses of Lords and Commons sat together. The courts of law, which at that time were established and had the same powers which they now enjoy, were clearly subordinate to the parliament. A writ of error lay from them to the parliament, and they were accustomed even to consult parliament before they decided points of difficulty and importance. But, according to the argument now urged, an act of the whole parliament might at that very time have been reviewed by a court of law. The houses of parliament were subsequently divided. If the courts of law could not, before that time, have inquired into the legality of a commitment, or the publication of a paper, by parliament, neither could they do so afterwards. When the houses were divided, which LORD ELLENBOROUGH (in *Burdett v. Abbot*, 14 East, 137,) supposes to have been done by statute, whatever was done by either in the exercise of its privileges was the act of the whole parliament. All such acts of either house are still supposed to be the act of the whole. Thus a writ of error to parliament is, properly, an appeal to the whole body, not to one house: and the commons are supposed, in point of law, to form a part of the Court of Appeal, and concur with the lords in their decision. This subject is treated of in LORD HALE's "Jurisdiction of the Lords' House, or Parliament," chap. iii. and chap. xxii. (see 4 Inst. 23; 5 Com. Dig. Parliament (L 1,)) and Mr. Hargrave's preface to that work.

The inconsistency which results from supposing that a court of common law can review the acts of either house of parliament may be thus illustrated. The House of Lords exercises an appellate jurisdiction in cases depending in this and the other courts of Westminster Hall. Suppose this court to decide that the House of Lords had acted illegally in voting a commitment: as, for example, if Anthony Earl of Shaftesbury, (see 6 How. St. Tr. 1269,) in 1677, instead of suing out a habeas corpus, had brought an action for the imprisonment, and a justification under the authority of the House of Lords had been pleaded and demurred to: upon writ of error, the decision of the court would have come under the review of the House of Lords itself. The incongruity is avoided by holding that this court, a subordinate tribunal, cannot take cognizance of a question which directly brings into dispute the authority of parliament. The House of Lords frequently direct the publication of proceedings on an impeachment; and judges have intimated an opinion that the publication of proceedings on a trial is not always justifiable. But would this court take upon it to determine, in such a case, whether or not the house had authority to make the proceedings public?

There is no distinction, for the purpose of this argument, between the House of Lords and the House of Commons. They have co-ordinate authority. Sir Robert Filmer, indeed (whose opinions, and some similar ones, are combated by Sir Robert Atkyns in his argument in *Rex v. Williams*, 13 How. St. Tr. 1369, (see p. 1400, et seq.)), held the House of Commons to be a mere excrescence, and to have had, originally, no independent authority. And, at the present day, observations tending strongly to excite prejudice against the proceedings of that house have

been published in the introduction, by Lord BROUGHAM, to the report of his judgment in *Wellesley v. The Duke of Beaufort*; where it is even said that there is not "a single argument ever urged in favour of privilege which would not serve as a pretence for allowing all the members of both houses to rob and murder with impunity on the highway." (a) But the House of Commons virtually comprehend the whole community of the realm; their acts are those of all the Commons of the United Kingdom. Lord HOLT says, in *Ashby v. White*, 2 Ld. Ray. 950, (b) "It is not to be doubted but that the Commons of England have a great and considerable right in the government, and a share in the legislative, without whom no law passes; but because of their vast numbers, this right is not exercisable by them in their proper persons; and therefore, by the constitution of England, it has been directed that it should be exercised by representatives, chosen by and out of themselves, who have the whole right of all the Commons of England vested in them." And in stat. 15 E. 2, (*Revocatio novarum ordinationum* (c)) it is enacted, that "the matters which are to be established for the estate of our lord the king, and of his heirs, and for the estate of the realm and of the people, shall be treated, accorded, and established in parliaments, by our lord the king, and by the assent of the prelates, earls, and barons, and the commonalty of the realm; according as it hath been heretofore accustomed." The Commons are the grand inquest of the nation. The House of Lords institute inquiries, but only in default of that duty being performed by the Commons. If there is corruption or oppression, the Commons are to accuse, the lords to judge. The power of publishing is essential to the Commons, in the discharge of their inquisitorial functions.

The commons have, in particular, the power of inquiring into the conduct of the courts of justice; and at the commencement of every

(a) "Speeches of Henry Lord Brougham," 1838, vol. iv. p. 344. The Attorney-General also referred to the following passages:—

"The pretensions at different times set up by the houses of parliament to certain privileges placing them above the law of the land, are the more familiarly known in consequence of their having of late been brought into discussion by a new and extravagant claim, asserted on behalf of the House of Commons, to publish libels through irresponsible agents." Vol. iv. p. 341. "The House of Commons did not perhaps deem the circumstance of the offender" (Mr. Lechmere Charlton) "being a member of the court against which he had committed a contempt, any mitigation of his offence. At all events they left the bar to protect its own privileges; and indeed there seems no conceivable reason why that body should not also have made common cause with the guilty party, so far at least as to inquire whether or not one of their members was rightfully imprisoned, and thus suspended from the exercise of his functions." Ib. p. 345. "All rights are now utterly disregarded by the advocates of privilege, excepting that of exposing their own short-sighted impolicy and thoughtless inconsistency. Nor would there be any safety for the people under their guidance, if unhappily their powers of doing mischief bore any proportion to their disregard of what is politic and just." Ib. p. 352.

(b) See the late edition of Lord Holt's judgment, referred to, post.

(c) The statute recites the commission granted, in 3 Ed. 2, by the king to the prelates, earls, and barons, to choose certain persons of the prelates, earls, and barons, and of other lawful men whom they should deem sufficient to be called unto them, for "ordining and establishing the estate of the household of our said lord the king, and of his realm;" under which commission ordinances were made, (5 Ed. 2, by the Archbishop of Canterbury and the bishops, earls, and barons thereunto chosen: and that, upon examination in parliament (15 Ed. 2), by the prelates, earls, and barons, and by the commonalty of his realm, the said ordinances were found prejudicial: the same are therefore annulled; and it is enacted, "that for ever hereafter, all manner of ordinances or provisions, made by the subjects of our lord the king or of his heirs, by any power or authority whatsoever, concerning the royal power of our lord the king or of his heirs, or against the estate of our said lord the king or of his heirs, or against the estate of the crown, shall be void and of no avail or force whatever; but the matters," &c. Then follows the passage in the text. The act is printed in the statutes of the realm, published by the Record Commission, 1810 (vol. 1, p. 189). See Brady's History of England, vol. iii. p. 146.

session a grand committee of justice is appointed by that house, (see 4 Inst. 11,) to receive complaints from the various tribunals within the jurisdiction of the house. The house itself is, according to all authorities, a court; whether a court of record or not, is immaterial, for the Court of Chancery is not so, yet it has, not the less, every necessary power for enforcing its judicial authority. In Com. Dig. Parliament (E. 14,) it is said (in treating of the House of Commons) that "A committee for justice may summon any judges, and examine them in person, upon complaint of any misdemeanor in their office." And accordingly, in 19 Car. 2, KEELING, Chief Justice of the King's Bench, appeared in person before the House of Commons on complaint made against him of "misdemeanors, done in the said office, as fining of juries," &c. 1 Sid. 338.(a) The acts there inquired into were not erroneous decisions, which might have been remedied by ordinary course of law, but irregular and oppressive proceedings, for which the only remedy was by the interference of the house. [Lord DENMAN C. J. In *Bushell's case*, 22 Car. 2. Vaugh. 135. (S. C. Freem. K. B. & C. P. 1. Sir T. Jones, 13,) the jury who had been committed were discharged on habeas corpus by the Court of Common Pleas.] The Court of Common Pleas might discharge the parties in that case on habeas corpus, because they had been committed by an inferior court, the court of sessions of oyer and terminer at the Old Bailey. But an action, as HALE, C. J. afterwards intimated, would not have lain for the imprisonment. (*Bushell's case*, 26 Car. 2. 1 Mod. 119.) Sir Robert Atkyns says in *Rex v. Williams*, 13 How. St. Tr. 1413, "I myself have seen a lord chief justice of this court, while he was lord chief justice, and a learned man, by leave from the House of Commons, pleading before that house for himself, and excusing what he had done in a trial that came before them in the west, whereof complaint was made to the house. And he did it with that great humility and reverence, and those of his own profession and others, were so far his advocates, as that the house desisted from any further prosecution."(b) In the year 1 W. & M. (1689,) Sir FRANCIS PEMBERTON and Sir THOMAS JONES were questioned by the House of Commons, 12 How. St. Tr. 822, for "their judgment given, against the privileges of the house, in the case of *Jay v. Topham*, (see 14 East, 102, note a,) and were committed to custody. And it cannot be doubted that such a power still exists. Even in our own times, the case of an Irish judge,(c) against whom a complaint had been made, was entertained, and his petition thereon received, in the House of Lords, whose authority in such a case is, at any rate, not greater than that of the House of Commons.

But according to the plaintiff, in a case like any of these, the judges might again sit in inquisition upon the proceedings of the House of Com-

(a) Reference is made in the margin to *Rex v. Wagstaffe*, (*Bushell's Case*), 1 Sid. 272.

(b) This apparently refers to the steps taken in the House of Commons in 1667, against Keeling, C. J., who appeared before the house at his own request; 6 How. Sta. Tri. 992, citing 4 Hats. Pr. 113. See also the proceedings against several of the judges, in the House of Commons, in 1680; 8 How. Sta. Tr. 163, 193, 194. It does not appear that, on this latter occasion, any of the judges attended the house; for North, in his *Examen*, p. 567, (cited, 8 How. St. Tr. 168, note) says—

"It was much wondered, at the time, that, in all this noise about the judges, none were sent for to the house; the cause was thought to be, that they were stout men, and would have justified all they had done, and that was not thought reasonable."

(c) The Attorney-General was understood to allude to the case of Mr. Justice Fox, a judge of the Common Pleas in Ireland. See his petition, 45 Lords' Journ. 662; and the resolution for postponing the proceedings for two months, p. 716. Also 7 Parl. Deb. 752, 788. A. D. 1806.

mons; and not only the judges of the superior courts, but those of the county court, and other inferior tribunals. Yet even the Court of Queen's Bench cannot issue a mandamus or a prohibition to the House of Lords, or House of Commons. There might indeed be a court superior to the legislature, like the Supreme Court in the United States of America, which is authorised to decide on the legality of acts of Congress, and to determine questions between the whole Union and a particular state, or between one state and another. But here no such court exists. And, as there is no appeal from the Supreme Court in America to Congress, the absurdity does not exist there which would arise in this country if the courts of law had the jurisdiction contended for, namely, that the legislative body is a court of appeal from that very tribunal which affects to control its decisions.

The administration of the law of parliament is referred by the constitution to the two houses of parliament exclusively, as other courts exclusively administer the revenue law, the canon law, the maritime law, and equity. And this peculiar jurisdiction is necessary from the nature of parliamentary privilege. That privilege was created in order that the Houses might perform their functions effectively and independently; it has existed always, and not by derivation from the Crown; it is as old as the prerogative, and as much part of the constitution. It could not have existed beneficially, if cognisable by inferior tribunals. Privilege is given to the House of Commons to be exercised against the Crown and the House of Lords; unless the Commons were themselves the tribunal by which their privilege is to be judged, it would have been abolished long ago. The necessity for preserving it from interference by the courts of law is not to be estimated from the present improved state of those courts. The law of privilege was settled when judges were the creatures of the crown, and liable to be discarded if not obedient, and when the kings themselves used to interfere in the administration of justice which they did personally, and as judges, in ancient times, and afterwards by letters to the judges, directing them how to act in particular cases, a practice several times checked by statute, as, in particular, by stat. 2 Ed. 3, c. 8, and 18 Ed. 3, stat. 4.(a) And, although the judges are now independent of the crown, there may still be a proper constitutional jealousy lest, at some time, a desire of popularity(b), or of extending the jurisdiction of the courts, should lead them to decisions against wholesome and useful privilege, as mischievous as those formerly given in submission to the king's authority. But, during the struggles of the House of Commons against the crown, as in the reigns of Elizabeth, James I., and Charles I., the privileges of the house would clearly not have survived if they had depended on the ruling of judges. And, at any period, in the case of a contest between the two houses, if a question of privilege arose, and could be decided by a court of common

(a) See, on the subject of interference by the kings of England with judicial proceedings, a great number of authorities cited by Mr. Amos in a note to his edition of Fortescue, p. 23, note B. to chapter 8. Also Sir F. Palgrave's *Rise and Progress of the English Commonwealth*, vol. i. p. 27d. Part 1, c. 9.

(b) He cited here from vol. i. of Lord Erskine's *Speeches*, p. 379, 2d ed. the following passage of Lord Mansfield's judgment in the case of the Dean of St. Asaph. "The judges are totally independent of the ministers that may happen to be, and of the king himself. Their temptation is rather to the popularity of the day. But I agree with the observation cited by Mr. Cowper from Mr. Justice Foster, 'that a popular judge is an odious and a pernicious character.'"

law, the ultimate appeal would be to the House of Lords, who would thus become judges, in the last resort, of the privileges of the commons. Thus in the case of *Shirley v. Fagg*, 6 How. St. Tr. 1121, and in that of *Regina v. Paty*, 2 Ld. Ray. 1105; (S. C. 2 Salk. 503. Reports temp. Holt, 526.) if the parties committed by the commons had brought actions of trespass, and the court of common law had determined the question of privilege, the House of Lords, on appeal, would have been, in a manner, judges in their own cause. And there is no remedy against the abuse of such an authority, since the House of Lords cannot be dissolved.

The *lex parliamenti* is not known to the judges of the common law courts. They have no means of arriving judicially at any information on the subject of privilege. The judges, even of the superior courts, are not, in general, and cannot be presumed to have been, members of either house of parliament. The parliamentary reports, and even the journals, furnish little information on the subject, many privileges resting wholly in usage. It is said that all subjects of the realm are bound to take notice of parliamentary privilege; but that does not imply a judicial knowledge. All persons are bound to take notice of the general law of the land; but all are not competent to administer it. It was an observation of Speaker Onslow, (cited, 2 Hats. Prec. 75, note), "that common lawyers, accustomed to the forms and practice of the courts of Westminster Hall, know little of parliamentary law, or of the forms of proceeding in parliament." If the judges of the courts in Westminster Hall are little acquainted with parliamentary privilege, still less can the judges of inferior courts be supposed to understand it.

Either the courts of common law must take the law of privilege as laid down by the houses of parliament, or the houses must accept it from them. In the latter case, the decision of a *pie poudre* court may bind the lord chancellor and the speaker. And the judgments of the common law courts may not be uniform. There may be twenty actions against the speaker for libel or false imprisonment, or as many indictments (for if privilege is no bar to a civil action it is clearly no answer to an indictment), and as many county courts, or courts of quarter session, may be of different opinions as to the law. By what rule, then, is parliament to be guided in its exercise of privilege?

The existence of privilege, therefore, necessarily requires that that privilege should be declared by the house to which it belongs. If it does not exist, of course no question arises as to the proper tribunal. If it does, it cannot be usefully exercised unless judged of by the houses themselves. And, even in the introduction (a), already cited, to Lord Brougham's judgment in *Wellesley v. The Duke of Beaufort*, it is allowed that, "in order to be consistent," the champions of privilege "must maintain that the houses of parliament alone are the judges of their privileges. This right is worth nothing if it is confined to judging of the general and abstract question. They accordingly also maintain that they alone are the judges to decide whether, in any particular instance, those privileges have been broken."

It is objected that the carrying privilege to this extent gives each house of parliament a legislative power, independently of the crown and of the other house. But the proposition contended for goes no further than to

say that each house is a court of exclusive jurisdiction, as the ecclesiastical courts, the admiralty court, and the court of exchequer, are with respect to particular branches of the law. They have not power to make the law, but only an exclusive authority to declare it on particular subjects. It does not follow that they can extend their jurisdiction. It has been said that much of the law established in the common law courts is "judge-made;" and it may be so described: but the judges exercise no legislative power: the law which they deliver is supposed to have always existed, and to be merely declared by them.

Arguments are likewise drawn from the liability of this privilege to abuse: but such a liability does not show that the privilege has no existence. In every balanced government there must be powers so constituted as to check each other, powers which have their respective limits, but for the abuse of which there can be no remedy. In this country the crown has, by its prerogative, the powers of declaring peace and war, of pardoning, and of summoning and dissolving parliament; and if these are abused the law furnishes no remedy. So the House of Lords have the power of judicature in the last resort; and for any decision they might give in abuse of that power there is no redress. The House of Commons has the absolute power of voting the public money, and might stop the supplies improperly. An attorney-general may enter a *nolle prosequi* on any prosecution, and might, if he chose to abuse that power, obstruct the course of justice. He may refuse his fiat for a writ of error; or he may make an injurious use of the discretion vested in him as to filing criminal informations. But these powers do not the less exist. The three branches of the legislature have an unlimited power. They might make a statute for abolishing the House of Commons. The Septennial Act was a strong instance of their exercise of authority. They might pass an act for changing the religion of the country against the wish of the people. For such cases no redress is provided by the law; if they occur, revolution has begun, and the only remedy is resistance.

It may, however, be observed that the same argument from the possibility of abuse, which is urged against privilege as insisted upon by the House of Commons, applies equally to the power claimed for the common law courts, of determining how far privilege extends.

It is true that the power claimed by the Commons of declaring their own privilege has, in past times, been frequently abused. But, first, the constitution supposes that the house consists of independent and intelligent men, who will discharge their duty: and, secondly, there are many instances of conduct pursued by the judges in past times, which show what consequences would have ensued if the law of privilege had always rested in their hands. On points not involving privilege, it is sufficient to cite the cases (mentioned by Mr. St. John in his speech at a conference between the houses in 1640 (a)) of Wayland, chief justice of the Common Pleas, who was banished for taking bribes, temp. Ed. 1, and Thorpe, chief justice of the King's Bench, who was adjudged to be hanged for the same offence, temp. Ed. 3: the decision of a great majority of the judges in favour of the claim of ship-money, *Rex v. Hampden*, 3 How. St. Tr. 825; and the case of Sir Thomas Darnel and others, 3 How. St. Tr. 1, where the judges of this court held that a person committed by order of the king in council was not to be discharged on habeas corpus.

(a) On the case of Ship Money, 3 How St. Tr. 1273.

Then, as to decisions of the judges on questions of privilege. In 11 Ric. 2 (1387) Tresilian, chief justice of the King's Bench, and Belknap, chief justice of the Common Pleas, with other judges, Belknap's associates, were required by the king to answer certain questions; and, among other answers (a), they stated that the parties who procured the passing of a statute then lately enacted (which they held derogatory to the king's royalty) "were to be punished with death, except the king would pardon them;" and they gave the same opinion as to those who moved the king to consent to that statute. Also, on being asked whether, if, on parliament being assembled, the king shall have limited certain articles upon which the Lords and Commons ought to proceed, and they will not proceed thereon until he shall have answered them on certain articles proposed by them, the king in such case ought not to have the governance of the parliament, &c.; they replied, "That the king in that behalf has the governance, and may appoint what shall be first handled, and so gradually what next in all matters to be treated of in parliament even to the end of the parliament: and if any act contrary to the king's pleasure made known therein, they are to be punished as traitors." And, being asked whether the Lords and Commons can, without the king's will, impeach in parliament any of the king's judges or officers for any of their offences, they answered, "That they cannot, and if any one should do so, he is to be punished as a traitor." In the *Case of Stroud, Long, Sel-den*, and other members of the House of Commons, in 1629, 5 Car. 1 the king caused questions to be propounded to the judges as to the liability of members for offences against the king or council "not in a parliament way;" and they answered that a member so offending might be punished for it after the parliament ended, if not punished in parliament; "for the parliament shall not give privilege to any 'contra morem parliamentarium,' to exceed the bounds and limits of his place and duty. And all agreed, that regularly he cannot be compelled out of parliament to answer things done in parliament in a parliamentary course; but it is otherwise where things are done exorbitantly, for those are not the acts of a court." And, in answer to the next question, they decided that a particular course of conduct, therein pointed out, would be "punishable out of parliament, as an offence exorbitant committed in parliament, beyond the office, and besides the duty of a parliament man. (b)" Stroud and the other members were afterwards committed to custody for acts done by them in parliament, and, on return to writs of habeas corpus, it appeared that the commitments were by warrants of the privy council. When the Court of King's Bench was ready to deliver judgment on the returns, the king removed the prisoners, from the several prisons in which they were confined, to the tower, and wrote letters to the judges stating his pleasure that none of the parties should come before the court "until we have cause given us to believe they will make a better demonstration of their modesty and civility, both towards us and your lordships, than at their last appearance they did." Accordingly no judgment was given;

(a) The Attorney-General read the questions and answers more at length, from 1 Parl. Hist 194, 195.

(b) 3 How. St. Tr. 237, 238. The Attorney-General also referred to the account of this conference in Nalson's Collections, vol. ii. p. 374, 375, cited, 3 How. St. Tr. 238, note. The proceedings referred to were those taken in parliament on March 2d, 1629, when the speaker was detained in the chair while certain votes were passed, after the king had ordered an adjournment.

and the prisoners remained in custody during the long vacation. In that vacation the king summoned two of the judges to Hampton, and conferred with them upon the case. In Michaelmas term the parties were brought up, and the court consented that they should be bailed, but required sureties also for their good behaviour. To the latter proposition they objected, stating, among other reasons, that "we cannot assent to it without great offence to the parliament, where these matters which are surmised by return were acted." The court answered that they had no knowledge, from the return to the habeas corpus, of the matters having been transacted in parliament. But HYDE, C. J., said: "If now you refuse to find sureties for the good behaviour, and be for that cause remanded, perhaps we afterwards will not grant a habeas corpus for you, inasmuch as we are made acquainted with the cause of your imprisonment." And the prisoners, not finding sureties for good behaviour, were remanded. In 1621, the House of Commons having entered upon their journals a protestation "that the liberties, franchises, privileges and jurisdictions of parliament are the ancient and undoubted birthright and inheritance of the subjects of England," James I. sent for the journals, and, in council, erased the protestation. (See 1 Parl. Hist. pp. 1361-3.) This is stated by the minutes of council to have taken place in the presence of the judges, and was, no doubt, done at their suggestion. Another instance of the manner in which the judges have treated constitutional rights is the resolution of eleven out of the twelve in favour of the dispensing power in *Sir Edward Hale's case*, 1686, 2 Ja. 2, (11 How. St. Tr. 1198, 1199.) Lord Clarendon, speaking of the transactions in the case of ship-money, and other abuses which took place about the same period, complains that the people saw, in the courts, "reason of state urged as elements of law, judges as sharp-sighted as secretaries of state, and in the mysteries of state; judgment of law grounded upon matter of fact, of which there was neither inquiry nor proof;" and he adds, "the damage and mischief cannot be expressed, that the crown and state sustained by the deserved reproach and infamy that attended the judges, by being made use of in this and like acts of power." Clar. Hist. Reb. vol. i. pp. 123-4, ed. 1826, 8vo.

These examples may be set off against the instances which have been cited of abuses of privilege by the House of Commons, and show that questions of privilege could not have been left in the hands of the judges with safety to the constitution.

But the true remedy for abuses of this kind is in the constitution itself. If an individual is aggrieved by the exercise of privilege, he may be heard, and his grievance redressed, on petition to the house. There may be a revision of what has been done by either house. There may be a conference between the two. The House of Commons, if it persist in an excess of authority, may be dissolved. Thus the difficulty occasioned in *Mr. Wilkes's case*, by the resolution that a member expelled could not be re-elected, was cured by a dissolution, and the election of a new House of Commons which rescinded the vote. The interference of courts of law to correct abuses of privilege is unnecessary, and, except *Sir W. Williams's case*, 13 How. St. Tr. 1369, there is no instance in which the authority of the courts has been enforced against an alleged abuse of this kind. Excesses which may have occurred in the assertion of privilege have, from time to time, been corrected by, or with the concurrence of, the houses themselves. The instances of abuse relied upon

on the other side come down to no later a period than 1760-1. The disposition of the houses to abate any grievance arising from privilege is shown by the statutes passed to facilitate actions against members. Before stat. 2 Ja. 1, c. 13, it had been considered that, if a person arrested in execution were discharged by reason of parliamentary privilege, the plaintiff was for ever barred from suing out a new writ of execution in the same case. By that statute, sect. 2, power was given to sue out a new execution when the privilege of the session should cease. But it may be observed that sect. 3, recognises the authority of the houses to enforce their own privileges; for it enacts that nothing in that statute contained shall extend "to the diminishing of any punishment to be hereafter by censure in parliament inflicted upon any person which hereafter shall make or procure to be made any such arrest as is aforesaid." Again, the remedies of suitors against members and their servants were still further facilitated by stats. 12 & 13 W. 3, c. 3, 11 G. 2, c. 24, and 10 G. 3, c. 50. The enactments of stat. 4 G. 3, c. 33, and subsequent acts, for bringing members of parliament within the provisions of the bankrupt laws, are another instance in which the houses have divested themselves of privilege for the general advantage. In the two recent cases of Mr. Long Wellesley, (*Wellesley v. The Duke of Beaufort*, 2 Russ. & Mylne, 639,) and Mr. Lechmere Charlton, (*In the matter of the Ludlow Charities*, 2 Mylne & Craig, 316,) the House of Commons has rejected the claim of its own members, imprisoned for contempt of the Court of Chancery, to be discharged by reason of privilege.

It is asked why the courts of common law may not judge of parliamentary privilege, as well as prerogative. But what is done by an officer of the crown under the prerogative is done at common law. There is no peculiar tribunal to decide what belongs to the prerogative. But privilege of parliament depends upon a law sui generis, and administered by a court having peculiar jurisdiction.

It is also asked what would be the remedy if either House of Parliament were to do something very outrageous, as to issue an injunction against proceeding in an ejectment; or to order the speaker to execute a person as a criminal. The answer is, that it is not decent to put such cases. It might as well be asked what remedy could be taken if the sovereign were personally to commit a crime. In the *Case of Monopolies*, 10 How. St. Tr. 407, Finch, Solicitor-General, (afterwards Lord Nottingham) says, in reply to a similar argument: "I take it, the possibility of the abuse of power, is no objection against that power. For by this argument, though the king has a power and prerogative by law to restrain subjects from going beyond the sea, by a *Ne exeat regnum*, no, say they, he cannot; for then he may restrain all his subjects from going out of the kingdom, and so imprison and hinder every one from going out of the nation."—"So that this way of arguing does strike at all power, and I need give no other reason for it, for there can be no power at all, which is not accompanied with some trust; and there is no trust, but it possibly (morally speaking) may be broken." The answer to such objections is also well stated in a passage of Considerations on the Law of Forfeiture for High Treason (by Charles Yorke) (a); where

(a) Page 116, 3d ed. London 1748.

The whole passage, which the Attorney-General read, is as follows:—After noticing the supposition that the king might summon the lords to pass laws without the Commons, the

it is observed that the law will not put such cases, and that they are out of the reach of laws and stated remedies. Where they occur, they tend to a dissolution of society, and to a condition of things for which the only cure is resistance. Wherever there is a paramount power, there is the same possibility of abuse: and paramount power must be lodged somewhere. In a limited monarchy it is distributed through various departments of the state; and the law supposes that power, so created for the public good, will be constitutionally and beneficially exercised. As to the order which it is said the House of Commons might make to put a man to death, such an order would not be within their general jurisdiction. The order now in question is so.

It appearing, therefore, on this record, that the action is brought for a thing authorised by order of the House of Commons, and to reverse that order, the question of privilege arises directly, and this court has no jurisdiction. It has only to see that the act was ordered by the house in exercise of the privilege which they claim, and to give judgment for the defendants.

II. The House of Commons has passed a resolution (which is pleaded, and admitted by the demurrer,) "that the power of publishing such of its reports, votes, and proceedings as it shall deem necessary or conducive to the public interests, is an essential incident to the constitutional functions of parliament, more especially to the Commons' House of Parliament as the representative portion of it." Then, supposing that the question of privilege arose here not directly but incidentally, this court would be bound by the resolution set out on the record. And, if the law be as declared, this action cannot be maintained, the order being made in exercise of a legitimate authority. The law is here laid down by a court of original jurisdiction: the allegation of its having been so declared is neither traversed nor qualified; it is not suggested that either House of Parliament has ever decided otherwise. The court cannot say à

author says, "Though the law will not suppose the possibility of the wrong, since it cannot mark out or assist the remedy; yet every member of that representative body might exclaim in the words of Crassus the Roman orator, when he opposed the encroachments of a tyrannical consul on the authority of the senate; '*Ille non consul est, cui ipse senator non sum*:' he is no king, to whom we are not a house of parliament. On the other hand, should the representative of the Commons, like that of Denmark, surrender the rights and liberties of the people into the hands of the king, and the king, instead of dissolving the parliament, should accept the surrender, and attempt to maintain it, contrary to the laws, and to the oath of the crown; or should the two houses take the power of the militia, the nomination of privy councillors, and the negative in passing laws out of the crown; these would be cases tending to dissolution: That is, they are cases which the law will not put, being incapable of distrusting those whom it has invested with the supreme power, or its own perpetual duration; and they are out of the reach of laws and stated remedies, because they render the exercise of them precarious and impracticable. This observation may be applied to every similar case, which can be formed in imagination, relative to the several estates; with this difference, that it holds strongest as to the king, in whom both the common and statute laws have reposed the whole executive power: Nor could the least branch of it be lodged in the two houses, for the purpose of providing a judicial remedy against him, unless the constitution had erected imperium in imperio, and were inconsistent and destructive of itself. Should it then be asked, What! has the law provided no remedy in respect of the king? and is the political capacity thus to furnish an exemption to him in his natural, from being called to account? the law will make no answer, but history will give one. When the king invaded the fundamental constitution of the realm, the convention of estates declared an abdication, and the throne vacant. Indeed the political character, or the king considered as an estate, still subsisted in notion and judgment of law; the right of the people to be governed by a limited monarch, according to the ancient exercise and distribution of powers between the three estates, remained as much as ever: but the exercise of the government was suspended, which made it a case tending to dissolution."

priori that no such privilege can be enjoyed; and, if not, how can they find out, on the argument of a demurrer, whether the House of Commons has enjoyed this privilege or not? Can the court, on demurrer, look into the journals, the debates, and the votes, to ascertain whether, in point of fact, the power has been exercised? If judicial determinations are sought for, they cannot inform the court what the privileges of parliament are, because many of the most essential have never been the subject of judicial determination.

The court has here a declaration of the House of Commons, not upon a matter of general law, of which the court itself is a proper judge, but upon parliamentary privilege. That declaration is evidence of the law, which the court is bound to receive as authority. So the resolutions of the judges (such as occur frequently in Lord Coke's reports) are evidence of the general law of England; and judicial notice is taken of a custom of trade which has been found by a special jury, or a custom of London certified by the recorder. The adjudication of the House of Commons on a point of parliamentary law ought not to have less weight than the adjudication of an ecclesiastical or admiralty court on a question of canon or maritime law. The question of privilege comes before this court like a question of foreign law; and, where it becomes necessary to decide incidentally a point of foreign law, or law belonging to another tribunal, the rule always is, to follow the law of the court of original jurisdiction.

The argument for the defendants is therefore greatly strengthened by the resolution of May 31st. But, independently of that resolution, it would be sufficient to show that the act complained of was done by the authority and order of the House of Commons in the exercise of their privileges.

That the law of parliament is peculiar, and distinct from the common law of England, appears from many authorities.

On the impeachment brought in 1388 (11 Ric. 2,) against the Archbishop of York, Tresilian and others, "the justices, serjeants, and other sages of the law, both of the realm and of the civil law, were charged by the king to give their faithful advice to the lords of parliament how they ought to proceed in the said appeal. Who answered, 'that they well understood the tenor of the said appeal; and affirmed, that it was not made nor brought according as the one law or other required.' Upon which the said lords of parliament having taken deliberation and advice, it was by the assent of the king, with their common accord declared, 'that in so high a crime as is laid in this appeal, and which touches the person of the king, and the estates of this realm, and is perpetrated by persons who are peers thereof, together with others, the cause cannot be tried elsewhere, but in parliament, nor by any other law, or court, except that of parliament; and that it belongs to the lords of parliament and to their free choice and liberty, by ancient custom of parliament, to be judges in such cases, and to judge of them by the assent of the king.'" 1 Parl. Hist. 207, 208.

There is a statutable allowance of privilege in 11 Ric. 2, not printed in the statute-book, but appearing on the parliament rolls, and evidently an act of parliament, (3 Rot. Parl. 244;) cited in *Burdett v. Abbot*. 14 East, 22, in these terms:—"In this parliament, all the lords, as well spiritual as temporal then present claimed, as their liberty and franchise, that the great matters moved in this parliament, or to be moved in other parliaments in time to come, touching peers of the land, should be agitated

(demesnez), judged and discussed by the course of parliament, and not by the civil nor by the common law of the land used in other lower courts (plus bas courtes) of the kingdom: which claim, liberty, and franchise the king readily (benignement) allowed and granted (ottroia) to them in full parliament." This is confined in terms to the House of Lords; but has always been considered as extending to matters transacted in or by authority of either house.

The judges have, in several instances, objected to deciding questions of privilege. Lord Coke, (13 Rep. 63,) says:—"Note, the privilege, order, or custom of parliament, either of the Upper House, or of the House of Commons, belongs to the determination or decision only of the Court of Parliament." And he then states the case of the Earls of Arundel and Devonshire, Ibid. (27 H. 6,) which was a controversy between them in the House of Lords "for their seats, places, and pre-eminences of the same." The king referred it to the judges to examine the title; and they reported "that this matter, (viz. of honour and precedency between the two earls, lords of parliament,) was a matter of parliament, and belongs to the king's highness, and the lords spiritual and temporal in parliament, by them to be decided and determined." Upon which Sir Robert Atkyns observes, in his argument for Sir W. Williams, 13 How. St. Tr. 1427: "One would think this were a strange answer of the judges, to deny their advice; were they not assistants to the lords in matters of law? The true reason of their declining to give their advice, is, it was a case above them, and not to be determined by the ordinary rules of law, and therefore out of their element. 'Quæ supra nos, nihil ad nos.' Therefore their answer was, That it was a matter of parliament, and belonged to the king and lords, but not to the judges."

Another instance is found in *Thorp's case*, 13 Rep. 63, (more fully in 1 Hats. Prec. 28, from 5 Rot. Parl. 239.) The House of Commons (in 31 & 32 Hen. 6, 1454) represented to the king and lords in parliament, that Thomas Thorp, their speaker was imprisoned, and they prayed his discharge according to the privileges of the House. Richard Duke of York informed the house that Thorp was taken in execution at his suit, in an action of trespass, and prayed that he might not be discharged. The lords "opened and declared to the justices the premises, and asked of them whether the said Thomas ought to be delivered from prison, by force and virtue of the privilege of parliament or no." The judges, after deliberation, answered and said: "That they ought not to answer to that question, for it hath not been used aforetime, that the justices should in anywise determine the privilege of this High Court of Parliament; for it is so high and mighty in his nature, that it may make law, and that that is law it may make no law; and the determination and knowledge of that privilege, belongeth to the lords of the parliament, and not to the justices." It may be contended that the judges merely refused to adjudicate; but they were not asked to decide; they were merely requested to give an opinion, and declined doing so, as the judges have in later times on questions of equity. This was the interpretation given to their conduct by Lord ELLENBOROUGH in *Burdett v. Abbot*, 14 East, 29. His lordship says that the question was not put to them as to persons who should adjudge, "but as advisers to the lords on the law. They say in effect, it is not a proper subject for us to enter into; it properly belongs to yourselves; and therefore it is not for us to advise you upon it."

In the *Case of George Ferrers*, 1 Hats. 56, 57, (citing Hollinshed's Chronicle,) the king (Henry VIII.) in the presence of the lord chancellor and judges, the speaker, "and other the gravest persons of the nether house," thus recognised the superiority of the law of parliament over that of the other courts. "We be informed by our judges, that we at no time stand so highly in our estate royal, as in the time of parliament; wherein we as head, and you as members, are conjoined and knit together into one body politic, so as whatsoever offence or injury (during that time,) is offered to the meanest member of the house, is to be judged as done against our person and the whole court of parliament; which prerogative of the court is so great (as our learned counsel informeth us) as all acts and processes coming out of any other inferior courts, must for the time cease and give place to the highest." And "Sir EDWARD MONTAGU, then Lord Chief Justice, very gravely declared his opinion, confirming by divers reasons all that the king had said, which was assented unto by all the residue, none speaking to the contrary."

In Coke's Fourth Institute, 15, it is said: "And as (a) every court of justice hath laws and customs for its direction, some by the common law, some by the civil and canon law, some by peculiar laws and customs, &c. So the High Court of Parliament *suis propriis legibus et consuetudinibus subsistit*. It is *lex et consuetudo parliamenti*, that all weighty matters in any parliament moved concerning the peers of the realm, or Commons in parliament assembled, ought to be determined, adjudged, and discussed by the course of the parliament, and not by the civil law, nor yet by the common laws of this realm used in more inferior courts; which was so declared to be *secundum legem et consuetudinem parliamenti*, concerning the peers of the realm, by the king and all the lords spiritual and temporal; and the like *pari ratione* is for the Commons for any thing moved or done in the House of Commons; and the rather, for that by another law and custom of parliament, the king cannot take notice of any thing said or done in the House of Commons, but by the report of the House of Commons: and every member of the parliament hath a judicial place, and can be no witness. And this is the reason that judges ought not to give any opinion of a matter of parliament, because it is not to be decided by the common laws, but *secundum legem et consuetudinem parliamenti*: and so the judges in divers parliaments have confessed. And some hold, that every offence committed in any court punishable by that court, must be punished (proceeding criminally) in the same court, or in some higher, and not in any inferior court, and the Court of Parliament hath no higher."

In 3 Hawk. P. C. p. 219, book 2, c. 15, s. 73, (Leach's ed. 1795,) it is said, "There can be no doubt but that the highest regard is to be paid to all the proceedings of either of those houses" (of parliament,) "and that wherever the contrary does not plainly and expressly appear, it shall be presumed that they act within their jurisdiction, and agreeably to the usages of parliament, and the rules of law and justice."

Sir William Blackstone, in 1 Comm. 164, after stating the objection made by the judges when called upon to answer in *Thorp's case*, 1 Hats. Prec. 28, (S. C. 13 Rep. 63,) says: "Privilege of parliament was principally established, in order to protect its members not only from being molested by their fellow subjects, but also more especially from being

(a) Opposite these words in the margin is "*Lex et consuetudo parliamenti. Ista lex ab omnibus est querenda, a multis ignorata, a paucis cognita.*" The same words are in Co. Litt. 11 b

oppressed by the power of the crown. If, therefore, all the privileges of parliament were once to be set down and ascertained, and no privilege to be allowed but what was so defined and determined, it were easy for the executive power to devise some new case, not within the line of privilege, and under pretence thereof to harass any refractory member and violate the freedom of parliament. The dignity and independence of the two houses are therefore in great measure preserved by keeping their privileges indefinite."

The dicta of judges on this subject concur with the opinions of text writers. DE GREY, C. J. says, in *Brass Crosby's case*, 3 Wils. 199, "This court cannot take cognizance of a commitment by the House of Commons, because it cannot judge by the same law; for the law by which the commons judge of their privileges is unknown to us." "The counsel at the bar have not cited one case where any court of this hall ever determined a matter of privilege which did not come incidentally before them," P. 202. "Courts of justice have no cognizance of the acts of the houses of parliament, because they belong *ad aliud examen*," P. 203. Acts of either house cannot, according to this opinion, be adjudged upon by the common law courts, even incidentally. And BLACKSTONE, J. there, referring to *Regina v. Paty*, 2 Ld. Ray, 1105, where HOLT, C. J. differed from the rest of the judges, says "we must be governed by the eleven, and not by the single one."

In *Regina v. Paty*, 2 Ld. Ray. 1108, 1109, POWYS, J. said, "The House of Commons is a great court, and all things done by them are to be intended to have been rite acta." "The House of Commons are a great branch of the constitution, and are chosen by ourselves, and are our trustees; and it cannot be supposed, nor ought to be presumed, that they will exceed their bounds, or do any thing amiss." And, he said, "The reason why there were no precedents of that kind" (of inquiry by this court into the proceedings of the house) was, "that it would be unreasonable to put the judges upon determining the privileges of the House of Commons, of which privileges they have no account, nor any footsteps in their books: that the House of Commons have the records of them, and, as occasion requires, search them to find them: that the judges cannot resort to those records, and, therefore, it is indeed impossible for them to judge matters of privilege." And POWELL, J. said, 2 Ld. Ray. 1110, "The Commons have also a power of judicature; and so is 4 Inst. 23; but that is not by the common law, but by the law of parliament, to determine their own privileges." "He said, this court might judge of privilege, but not contrary to the judgment of the House of Commons." "The court of parliament," he said, P. 1111, "was a superior court to this court; and though the King's Bench have a power to prevent excesses of jurisdiction in courts, yet they cannot prevent such excesses in parliament, because that is a superior court to them, and a prohibition was never moved for to the parliament."

LORD CAMDEN, in *Entick v. Carrington*, 19 How. St. Tr. 1047, after stating that the only instance of a power to commit without a power to examine upon oath is in the practice of the House of Commons, says, "But this instance is no precedent for other cases. The rights of that assembly are original and self-created, they are paramount to our jurisdiction, and above the reach of injunction, prohibition, or error."

In Com. Dig. Parliament (G. 1.), it is laid down, that "The parliament *suis propriis legibus et consuetudinibus subsistit*." And that "All

this had been a return of a commitment by an inferior court, it had been naught; because it did not set out a sufficient cause of commitment: but this return being of a commitment by the House of Commons, which is superior to this court, it is not reversible for form. And that answers the objections to the form of the commitment. We cannot judge of the privileges of the House of Commons, but they are to debate them among themselves. He said, it was objected, that by Mag. Chart. c. 29, no man ought to be taken or imprisoned but by the law of the land; but that the answer to this was, that there were several laws in this kingdom, among which was the *lex parliamenti*; which law, as it is said in the 4 Inst. 15, "*ab omnibus est querenda, a multis ignorata, a paucis cognita*;" and that it was uncertain that those words in the statute of Mag. Chart. were to be restrained to the common law. He said, the parliament had laws and customs peculiar to itself, and that this was declared to be *secundum legem parliamenti*; and that the judges ought not to give any answers to questions proposed to them about matters of privilege, because the privileges of parliament are not to be determined by the common law." He then commented on the cases of Lord Shaftesbury, 6 How. St. Tr. 1269, (S. C. 1 Mod. 144,) and Sir John Elliot, 3 How. St. Tr. 293, and concluded "that no habeas corpus would lie." POWYS, J. (whose judgment has been partly cited already, page 37, ante,) said, 2 Ld. Raym. 1108, "Shall the commons hinder a man from proceeding at law? Now in general speaking, that is the only use of privilege; and the meaning of privilege is, that it is a privilege against the course of law: such is the privilege of members against suits of law to be brought against them." And POWELL, J. (whose judgment also has been before cited, page 37, ante,) said, 2 Ld. Ray. 1110, 1111, that "this court might judge of privilege, but not contrary to the judgment of the House of Commons." "If they" (the Court of Queen's Bench) "should discharge those persons, that are committed by the House of Commons for a breach of privilege, this would be to take upon themselves directly to judge of the privileges of parliament. This want of jurisdiction in the court cures all the faults in the commitment." The greatest respect is due to HOLT, C. J., who differed, in this case, from the rest of the judges; but his was a single opinion against that of eleven, and it has been constantly overruled. Nor does his argument support the decision which he gives; for he said, "If the votes of both houses could not make a law, by parity of reason they could not declare law." (a) But this is an incorrect conclusion; for every court which administers law may declare, though it cannot make the law. A record of this case was made up on mature deliberation had by the judges; and the reason there stated for the decision is "*quod cognitio causæ captionis et detentionis prædicti Johannis Paty non pertinet ad curiam dictæ dominæ reginæ coram ipsâ regina.*"

In *Alexander Murray's case*, 1 Wils. 299, on return to a habeas corpus, it appeared that Mr. Murray had been committed by the House of Commons for a contempt; and, on motion that he might be admitted to

(a) 2 Ld. Ray. 1115. The corresponding passage in the judgment, as lately published from Holt's MSS. (see p. 39 note a, ante,) is, "If before this declaration there was never any privilege or right to appropriate to the House of Commons a jurisdiction to determine the point for which Paty brought his action, there can be none now; if there were, it ought to be showed. I know of none, nor did any man ever hear of it: the claim is no older than the declaration, which was made the last session of this parliament." p. 57.

bail, this court declined to interfere. The habeas corpus act, 31 Car. 2, c. 2, having been cited, WRIGHT, J. said, "It has been determined by all the judges" "that it could never be the intent of that statute to give a judge at his chamber, or this court, power to judge of the privileges of the House of Commons. The House of Commons is undoubtedly an high court, and it is agreed on all hands that they have power to judge of their own privileges; it need not appear to us what the contempt was, for if it did appear, we could not judge thereof." DENISON, J. added, "This court has no jurisdiction in the present case; we granted the habeas corpus, not knowing what the commitment was, but now it appears to be for a contempt of the privileges of the House of Commons; what those privileges (of either house) are we do not know, nor need they tell us what the contempt was, because we cannot judge of it; for I must call this court inferior to the House of Commons with respect to judging of their privileges and contempts against them." And FOSTER, J. said, "The law of parliament is part of the law of the land." (a)

In the *Case of Brass Crosby*, lord mayor of London, 3 Wils. 188; S. C. 2 W. Bl. 754, who was committed by the House of Commons for a contempt in holding their messenger to bail for having executed their warrant, a habeas corpus was sued out and a return made; and the Court of Common Pleas, after argument, remanded the lord mayor. DE GREY, C. J. said there, 3 Wils. pp. 199, 200, 203, "I do not find any case where the courts have taken cognizance of such execution, or of commitments of this kind; there is no precedent of Westminster Hall interfering in such a case. In *Sir J. Paston's case*, there is a case cited from the year-book (b), where it is held that every court shall determine of the privilege of that court; besides, the rule is, that the court of remedy must judge by the same [law] as the court which commits: now this court cannot take cognizance of a commitment by the House of Commons, because it cannot judge by the same law; for the law by which the Commons judge of their privileges is unknown to us." "How then can we do anything in the present case, when the law by which the lord mayor is committed, is different from the law by which he seeks to be relieved? He is committed by the law of parliament, and yet he would have redress from the common law; the law of parliament is only known to parliament-men, by experience in the house." "The House of Commons only know how to act within their own limits; we are not a court of appeal; we do not know certainly the jurisdiction of the House of Commons; we cannot judge of the laws and privileges of the house, because we have no knowledge of those laws and privileges; we cannot judge of the contempts thereof, we cannot judge of the punishment therefore." "Courts of justice have no cognizance of the acts of the Houses of Parliament, because they belong ad aliud examen." GOULD, BLACKSTONE, and NARES, Js. expressed similar opinions.

In the *Case of Alderman Oliver*, 2 W. Bl. 758, which was the same in its circumstances with that of the Lord Mayor Crosby, a habeas corpus was sued out in the Court of Exchequer, and a like judgment given by the unanimous opinion of the barons.

In *Rex v. Flower*, 8 T. R. 314, which came before this court on habeas

(a) He added, "and there would be an end of all law if the House of Commons could not commit for a contempt; all courts of record (even the lowest) may commit for a contempt."

(b) In 13 Rep. 64, Coke cites a case as *Sir John Paston's*. The reference is to 12 Ed. 4 2; perhaps Yearb. Hil. 4 Ed. 4, 43 A. pl. 4, is meant.

corpus, Benjamin Flower had been committed and fined by the House of Lords for a breach of their privileges, in publishing a libel on the Bishop of Llandaff. Lord KENYON there recognised the power of the House of Lords to imprison and fine for contempt, and said, "We were bound to grant this habeas corpus: but having seen the return to it, we are bound to remand the defendant to prison, because the subject belongs ad aliud examen." And GROSE, J. adopted the language of DE GREY, C. J. with respect to the House of Commons in *Crosby's case*, 3 Wils. 199, 201, 202, that the adjudication of the house on a contempt was a conviction, and the commitment in consequence execution; that every court must be sole judge of its own contempts; and that no case appeared in which any court of this hall ever determined a matter of privilege which did not come incidentally before them.

In *Rex v. Hobhouse*, 2 Chit. Rep. 207, (18 Eng. Com. Law Reps. 309,) (a) the commitment was by the House of Commons for contempt in publishing a libel. Mr. Hobhouse was brought before this court on habeas corpus, and remanded. The Court said, "We are not authorised to enter into the discussion of any of the objections taken by the gentleman on the floor to this commitment." "The cases of Lord Shaftesbury, 6 How. St. Tr. 1269, (S. C. 1 Mod. 144; 3 Keb. 792,) and *Rex v. Paty*, 2 Ld. Ray. 1105, (S. C. 14 How. St. Tr. 849,) are decisive authorities, to show that the courts of Westminster Hall cannot judge of any law, custom, or usage of parliament, and consequently they cannot discharge a person committed for a contempt of parliament. The power of commitment for contempt is incident to every court of justice, and more especially it belongs to the High Court of Parliament; and therefore it is incompetent for this court either to question the privileges of the House of Commons, or a commitment for an offence which they have adjudged to be a contempt of those privileges."

In addition to these authorities, which show that, on habeas corpus, the courts of common law will not interfere with a commitment by the House of Commons, it appears from *Bushell's case*, 1 Mod. 119, and *Hamond v. Howell*, 1 Mod. 184, that, even if a party were discharged on habeas corpus in such a case, no action would lie for the commitment. Bushell, one of the jurymen committed by the Court of Oyer and Terminer at the Old Bailey for acquitting Penn and Mead, and discharged subsequently by the Court of Common Pleas, (*Bushell's case*, 22 Car. 2. Vaughan, 135; S. C. Freem. (K. B. & C. P.) 1; T. Jones, 13,) brought an action against the lord mayor and recorder for false imprisonment; and, on motion in K. B. by the defendants for time to plead, HALE, C. J. said, 1 Mod. 119, that the habeas corpus was in the nature of a writ of error, and that, in the case of an erroneous judgment reversed, an action of false imprisonment would not lie against the judge or against the officer. "The habeas corpus and writ of error, though it doth make void the judgment, it doth not make the awarding of the process void to that purpose; and the matter was done in a course of justice: they will have but a cold business of it."

Several instances may be put in which the courts would not adjudicate upon privilege in an action for a thing done by either house, where the act itself directly raised, or might have raised, the question of privilege.

(a) S. C. (but the observations of the court on this point not reported) 3 B. & Ald. 490. 5 Eng. Com. Law Reps. 330.

In *Tash's case*, 1 Hats. Pr. 190, a complaint was made to the House of Commons that Tash had stopped a member of the house going into the House of Lords, and had shut the door upon him. He was committed by the Commons to the custody of the serjeant, and afterwards brought to the bar and discharged upon his submission, and payment of fees. If Tash had brought an action for the imprisonment, and the defendant had justified, it is clear that a court of law would not have inquired into the legality of the act of the house. So, if a party be taken into custody, under the sessional order, for an obstruction in the lobby. In *Williams's case*, 1 Hats. Pr. 92, a person was committed for assaulting a member of the House of Commons; in the *Case of Mr. Coke's Servant*, 1 Hats. Pr. 112, a party who had arrested a servant of a member of that house was brought in custody to the bar, and discharged, paying his fees: in each case without previous adjudication, warrant, or order. Had an action been brought in either case, and a justification pleaded, the question of privilege would have arisen directly, though there had been no specific order or adjudication in the particular case: but the authorities already cited show that the court could not have inquired whether the privilege existed. The present case is within the same principle.

It is a general rule that the judgments of courts of exclusive jurisdiction are conclusive against all the world; and their decisions bind courts in which the questions decided arise incidentally. In many instances a court of peculiar jurisdiction has prevented causes which were properly to be decided there from coming before any other tribunal. In *Mitchell v. Rodney*, 2 Br. Parl. C. 423, the defendant, under a plea of not guilty in trover, proved that the goods converted had been taken upon the surrender of St. Eustatius, and that a suit for condemning them was pending in the Court of Admiralty: and, the question being one of prize or no prize, which the court of common law could not determine, the House of Lords decided, affirming the judgment of the Court of King's Bench, that the defendant was entitled to judgment. In *Home v. Earl Camden*, 1 H. Bl. 476, the Court of Common Pleas prohibited the commissioners of appeal from the Court of Admiralty, who had issued a monition to bring in the proceeds of property claimed as prize; but the Court of King's Bench reversed this decision; *Lord Camden v. Home*, 4 T. R. 382: and the House of Lords affirmed the judgment of the King's Bench; *Home v. Earl Camden*, 2 H. Bl. 533, (S. C. 6 Br. Parl. C. 203.) The principle was the same as in the preceding case; but this case was the stronger, because the question arose between two British subjects, and the property had been sold pending the suit. *Le Caux v. Eden*, 2 Doug. 594, goes further still. That was an action for false imprisonment: and it appeared that the imprisonment took place by the capture of a ship which was released by the Court of Admiralty: but the Court of King's Bench held that the question of personal injury was incidental to that of prize or no prize, which could not be decided by a court of common law. *Lindo v. Lord Rodney*, Note [1] to *Le Caux v. Eden*, 2 Doug. 613, supports the same principle. Even the decisions of foreign prize courts are binding as to the facts found by them; *Geyer v. Aguilar*, 7 T. R. 681. Similar decisions have been given in the instance of the Ecclesiastical Courts; *Bouchier v. Taylor*, 4 Br. Parl. C. 708, *Prudham v. Phillips*, Amb. 763: of judgments of forfeiture and condemnation in the Exchequer; *Martin v. Wilsford*, Carth. 323, *Hart v. Macnamara*, 4 Price. 154, (note to *Rex v. Horton*), *Scott v. Shearman*, 2 W. Bl. 977: of acquit-

tal in the same court; *Cooke v. Sholl*, 5 T. R. 255: (though in the last two cases the action was trespass, and the previous judgment was *in rem*): of a judgment by commissioners of excise; *Fuller v. Fotch*, Carth. 346, (S. C. Holt, 287.) It is true that a stranger may show (though a party to the judgment may not) that the judgment was obtained by fraud, as was said in *Prudham v. Phillips*, Amb. 763, and in the *Duchess of Kingston's case*, 20 How. St. Tr. 537-45, note. So the sentence of an ecclesiastical court in a suit for the fulfilment of a contract of marriage *per verba de futuro* was held binding when given in evidence upon non assumpsit in an action for a breach of promise of marriage; *Da Costa v. Villa Real*, 2 Str. 961. In *Brittain v. Kinnaird*, 1 Br. & B. 432, a conviction by a magistrate, under stat. 2 G. 3, c. 28, was held conclusive proof that the vessel was a boat within the statute, in an action of trespass for taking the boat. And there DALLAS, C. J., referring to a suggestion that a magistrate might seize a seventy-four gun ship, and call it a boat, said, "Suppose such a thing done, the conviction is still conclusive, and we cannot look out of it."

The following authorities show that, when a question comes incidentally before a court not having original jurisdiction in the subject-matter, such court must decide according to the law of the court which has the original jurisdiction. In *Juxon v. Lord Byron*, 2 Lev. 64, it was decided that the Spiritual Court, if a temporal matter arise incidentally before it, must decide it according to common law. So, if the temporal question be a matter of fact, it must be tried by the same evidence as at common law; *Shotter v. Friend*, 2 Salk. 547. In *Barnes's case*, 2 Rol. R. 157, the return to a habeas corpus showed a judgment by the warden of the Cinque Ports, under which the party was imprisoned for refusing, upon summons, to restore an anchor which he had taken when thrown up between high and low water mark. This judgment no court of common law could have pronounced; yet the Court of King's Bench held it a good return, it being alleged on it that the proceeding "*suit juxta leges maritimas*." The same principle appears from *Gure v. Gapper*, 3 East, 472, followed by *Gould v. Gapper*, 5 East, 345. In the latter case Lord ELLENBOROUGH cited the language of Blackstone, 3 Com. 112, where it is said that a prohibition "may be directed to the Courts Christian, the University Courts, the Court of Chivalry, or the Court of Admiralty, where they concern themselves with any matter not within their jurisdiction; as if the first should attempt to try the validity of a custom pleaded, or the latter a contract made or to be executed within this kingdom. Or, if, in handling of matters clearly within their cognizance, they transgress the bounds prescribed to them by the laws of England; as where they require two witnesses to prove the payment of a legacy, a release of tithes, or the like; in such cases also a prohibition will be awarded. For, as the fact of signing a release, or of actual payment, is not properly a spiritual question, but only allowed to be decided in those courts, because incident or accessory to some original question clearly within their jurisdiction; it ought therefore, where the two laws differ, to be decided not according to the spiritual, but the temporal law; else the same question might be determined different ways, according to the court in which the suit is depending: an impropriety, which no wise government can or ought to endure, and which is therefore a ground of prohibition." *Carter v. Crawley*, T. Raym. 496, a judgment of NORTH, C. J. shows the

same principle. It follows that this court must adopt the law of parliament, alleged, as a fact, in the plea, and admitted by the demurrer.

In *Rex v. Wilkes*, 2 Wils. 151, a member of the House of Commons, arrested under a secretary of state's warrant, for publishing a seditious paper, brought habeas corpus in the Common Pleas, and was discharged as being privileged. Afterwards the two houses resolved that privilege did not extend to cases of libel. (Nov. 1763. 15 Parl. Hist. 1362, 1371.) The courts of law would now act upon those resolutions, and disallow the privilege. In 1769 Wilkes was expelled from the House of Commons for a libel; (Feb. 3d, 1769. 16 Parl. Hist. 546;) and the House of Commons resolved that he was incapable of being re-elected for the then parliament. (Feb. 17th, 1769. 16 Parl. Hist. 580.) Afterwards the resolution was rescinded. (May, 1782. 22 Parl. Hist. 1411.) The point might have arisen, or might now arise, incidentally before the common law courts upon an action for a false return, or a double return, under stat. 7 & 8 W. 3, c. 7, ss. 2, 3: and in such case the courts would clearly be bound by the resolution of the house, if properly placed on the record.

Courts of exclusive jurisdiction interfere to prevent other courts from acting in matters within such jurisdiction. The House of Commons might therefore have prevented this court from proceeding in the present case, had that been considered an expedient course. In an *Anonymous case* in Lane, 55, the Court of Exchequer restrained a party from proceeding in trespass in any other court, against a bailiff who had levied an amercement under Exchequer process. In *Caithorne v. Campbell*, 1 Anstr. 205, (note,) the same practice was elaborately maintained by EYRE, C. B., where a similar action was removed from the Common Pleas into the Exchequer. And, in an *Anonymous case* in 1 Anstr. 205, the case last mentioned was acted upon by MACDONALD, C. B. In these cases the courts have judged of their own privileges, and have asserted them by preventing other courts from interfering. So the Court of Chancery will not allow a suit (unless by its own permission) against a receiver appointed by itself; as ejectment; *Angel v. Smith*, 9 Ves. 335. *Ex parte Clarke*, 1 Rus. & Myl. 563, is to the same effect. In *Scroggs's case*, 6 Bac. Abr. 530, (7th ed.) Privilege, (B) 2, 26 C. 2, a serjeant at law was arrested on a latitat at the door of Westminster Hall: and the Court of Common Pleas discharged him, and said that they would commit the plaintiff if he sued the sheriff for the escape.

In *Biggs's case*, A. D. 1768, 32 Lords' Jour. 185, 187, the Lords ordered a person into the custody of the black rod, for bringing an action against a justice of the peace who had apprehended him by command of the house for a riot at the door of the house. The attorney was also committed to Newgate; and the plaintiff in the action was not discharged from custody until he had released the defendant. In *Hyde's case*, A. D. 1788, 38 Lords' Jour. 250, Mr. Hyde was committed by the Lords for indicting a constable who had assaulted him; the assault having been committed in pursuance of a general order of the house to refuse admission into Westminster Hall during the trial of Warren Hastings. In 1827 the House of Lords acted upon the same principle in *Bell's case*, 59 Lords' Jour. 199, 206, where the messenger of the house had received an umbrella from the owner at the door of the house, and had not returned it, and the owner sued for the value in the Court of Conscience, and recovered. The house summoned both the owner and the clerks of the court before them: and the plaintiff was discharged on his submis-

sion, and the officers upon their declaring their ignorance of the nature of the summons. The proceeding might have been the same, if the suit had been in a superior court. [Lord DENMAN, C. J. Had the messenger there done more than take the umbrella ?] All that appears is, that it was deposited in the usual place, and not returned to the owner. But the question clearly turned, not on the merits of the particular case, but on the contempt.

There is a class of cases in which it has been held that actions of this kind are not maintainable, though the House of Parliament has not interposed; and this to avoid collision on questions of privilege. Before stat. 7 & 8 W. 3, c. 7, in *Nevill v. Stroud*, 2 Sid. 168, the question arose, but was not decided. *Barnardiston v. Some*, 2 Lev. 114, which has been relied upon for the plaintiff, was a decision of this court that an action lay for deceitfully making a double return: but that judgment was reversed in the Exchequer Chamber by six judges against two; *Barnardiston v. Soame*, 6 How. St. Tr. 1070; where NORTH, C. J. delivered a judgment fully bearing out the principle now contended for. The judgment of the Exchequer Chamber was affirmed in the House of Lords after the Revolution; *Barnardiston v. Soame*, 6 How. St. Tr. 1117; upon consultation with the judges. The doctrine of the last case was acted upon in *Onslow's case*, 2 Vent. 37, and recognised in *Prideaux v. Morris*, 2 Salk. 502, with the concurrence of HOLT, C. J. It is true that in *Wynne v. Middleton*, 1 Wils. 125, WILLES, C. J. dissented from the opinion delivered in *Prideaux v. Morris*, 2 Salk. 502: but his opinion is contrary to repeated decisions.

Actions for things done in parliament, or by the authority of parliament, have uniformly been held not to lie, and judgments in them, if obtained by the parties suing, reversed. In *The Bishop of Winchester's case*, 4 Inst. 15, (Yearb. Pasch, 3 Ed. 3, fo. 18 B. pl. 32,) the bishop was proceeded against in the King's Bench for absenting himself from parliament; and he pleaded to the jurisdiction, that such offence ought to be corrected in parliament, and not elsewhere: and the plea was allowed. In *Plowden's case*, 4 Inst. 17, (1 Parl. Hist. 625,) the attorney-general filed an information in this court against Plowden, the eminent lawyer, and others, for departing from parliament without license: Plowden traversed; and the proceedings, which commenced in the reign of Mary, dropped upon the demise of the crown. It cannot be inferred that Plowden meant to admit the jurisdiction, though he showed by his plea that, in point of fact, he had not committed the offence. In *Strode's case*, 1 Hats. 85, a member of the House of Commons was prosecuted in the Stannary Court for bringing a bill into parliament; and the prosecution succeeded: but, upon this, stat. 4 H. 8, c. 8, was passed, avoiding the proceedings, and all suits &c., for the future, "for any bill, speaking, reasoning, or declaring of any matter or matters concerning the parliament:" and it was afterwards resolved by both houses; (1667; 9 Com. Journ. 19; 12 Lord's Journ. 166,) that this extended to all members in all parliaments. In *Sir John Elliot's case*, 3 How. St. Tr. 293, the attorney general filed an information against Sir John Elliot for language and acts which, as appeared by the information, had been spoken and done in the house. The defendant pleaded to the jurisdiction. The judges stated, at the opening of the case, that they had already considered and resolved upon the point, and that they should hold offences committed criminallv and contemptuously in parliament punishable in

another court, the parliament being ended; and so they ultimately decided, and the defendant was found guilty. But no judge, even there, went so far as to hold that they had jurisdiction over acts done by the whole house: it was admitted that there was no such jurisdiction. The Long Parliament, in 1641, complained of this judgment as against the law and privileges of parliament; and it was reversed in the House of Lords, (see 3 How. St. Tr. 319, 333,) after the Restoration, both houses having passed resolutions against it. The authority of *Rex v. Williams*, 2 Show. 471, (S. C. 13 How. St. Tr. 1369,) is abandoned on the other side. There the defendant was indicted for having (when speaker) published Dangerfield's Narrative by order of the House of Commons. He pleaded to the jurisdiction; the attorney-general demurred; and the court gave judgment immediately, interrupting Pollexfen upon his using the words "The Court of Parliament." The defendant's counsel declined to go on; judgment was given for the crown, and the defendant was fined 10,000*l*. The House of Commons, after the Revolution, resolved that the judgment was illegal, and against the freedom of parliament; (1689; 10 Com. Journ. 215.) That was, indeed, the act of only one branch of the legislature; but the Bill of Rights, stat. 1 W. & M. sess. 2, c. 2, recites, as one of the grievances committed under James II. prosecutions in the Court of King's Bench for matters and causes cognisable only in parliament; and declares that debates or proceedings in parliament ought not to be impeached or questioned in any court or place out of parliament. The decision was not, indeed actually reversed; nor, in strictness was it erroneous, for the plea was to the jurisdiction, and not in bar, as it ought to have been; so that the defence was not formally on the record. (a) But is admitted here that, in principle, that decision cannot be supported; and such an admission is conclusive against the plaintiff. The act complained of here is as much done by the whole House of Commons as the publication by the speaker in *Rex v. Williams*, 2 Show. 471, (S. C. 13 How. St. Tr. 1369.) No just distinction can be suggested between criminal and civil proceedings; if there be no criminal liability, there can be no civil liability.

In *Jay v. Topham*, (note (a) to *Burdett v. Abbot*, 14 East, 102,) the defendant was sued for false imprisonment; he pleaded to the jurisdiction, that he was serjeant-at-arms to the House of Commons, and had taken the plaintiff by order of the house. The plaintiff demurred to the plea, as being pleaded after full defence, and yet not answering all the declaration: and there was judgment of respondeat ouster. After the Revolution, this case was brought before the House of Commons on the defendant's petition, and referred to a committee of privileges. The house resolved that the judgment was illegal, 12 How. St. Tr. 821. The two surviving Judges, PEMBERTON and JONES, being brought before the house, defended themselves on the ground that the plea should not have been to the jurisdiction: but they admitted fully that the defence was, if properly pleaded, a valid one. In fact, however, it seems that

(a) The attorney-general here stated that it had been suggested that the proceeding was collusively instituted, but, he said, it appeared from documents, then in the possession of a descendant of Sir W. Williams, that at least the form of payment of 8000*l*. (which is said in Shower to have been accepted for the 10,000*l*.) was gone through. He observed, however, that Sir W. Williams afterwards became a favourite of the Duke of York, and was employed in the prosecution of the Seven Bishops; 12 How. St. Tr. 183, see 225, note. As an instance of the ostensible exaction of a fine, he referred to Sir S. Bernardiston's case in the proceedings between *Skinner* and *The East India Company*, 3 Hala. Pr. 345

there was a plea in bar, which was over-ruled, as appears from *Nelson*, (2 Nels. Abr. 1248, was referred to; but *Verdon v. Topham*, T. Jones, 208, is the case there named,) and from Topham's petition, 10 Com Journ. 164. The two judges, therefore, had knowingly violated the law, to gratify the court party, and were not treated with undeserved severity by the Commons. The record is not in the treasury; it was taken up to the House of Commons on the occasion of the petition, and probably not returned. *Verdon v. Topham*, 2 T. Jones, 208, was an action of the same kind against the same party: there was a plea to the jurisdiction, and judgment of respondeat ouster; but little else appears. *Lord Peterborough v. Williams*, 2 Show. 505, 13 How. St. Tr. 1437, was an action of scandalum magnatum against the speaker, for reflections on the plaintiff contained in Dangerfield's Narrative. The same matter was pleaded as in *Rex v. Williams*, 13 How. St. Tr. 1369, S. C. 2 Show. 471; but it does not appear that judgment was given, and the suit seems to have been compromised. Dangerfield himself was prosecuted, 1 Ja. 2, for publishing the narrative, (*Rex v. Dangerfield*, 3 Mod. 68,) and convicted; but whether the circumstances of the publication afforded any defence under privilege does not appear. The severity of the punishment, however, shows the feeling which existed as to the publication, at the time of the trial, and the spirit in which, probably, the proceedings were conducted.

The ultimate result of the cases of this period is, that no criminal or civil liability is incurred for acts done by the authority of either house of parliament. It is true, that the bill for reversing the judgment against Williams was not carried. It passed the House of Commons, but not the upper house. The reason is supposed to have been, that it was meant to indemnify Williams, but that there was no fund. It was thought hard that Sawyer, the attorney-general, should be made to furnish the indemnity; and he had friends in the House of Lords. The proposed act was, in its nature, private: but the principle of the decision had been disaffirmed by the bill of rights.

Since the Revolution, there has been only one instance in which actions have been brought for any thing done by the authority of the house, namely, the case of Sir Francis Burdett. *Burdett v. Abbot*, (in K. B. 14 East, 1, in Exch. Ch. 4 Taunt. 401, in Dom. Proc. 5 Dow. 165,) was an action of trespass against the speaker for false imprisonment; and, in principle, it cannot be distinguished from an action on the case for libel. Holroyd, who was counsel for the plaintiff, argued that the common law courts could judge of the law of parliament upon the question arising incidentally; but he failed to show that the question there did arise incidentally. The Attorney-General, Sir V. Gibbs, showed that the case could not be distinguished from those which had arisen upon habeas corpus. And that proposition was adopted by the judges, who held that the question arose as directly in the case before them as it would have done in a proceeding upon habeas corpus. So, here, the case is as if the House of Commons had committed the plaintiff for suing, and he had brought himself up by habeas corpus. In *Burdett v. Colman*, (in K. B. 14 East, 163, in Dom. Proc. 5 Dow. 170,) the action was against an officer of the house: the same defence was pleaded as in the former case; but the plaintiff new assigned for excess, and the defendant had a verdict. That case also was taken up to the House of Lords, for judgment non obstante veredicto; and in that also it was held

that the complaint was answered, and that the warrant of commitment would have sufficed on return to a habeas corpus. Now the decisions must have been the same, if the actions had been in case for publishing the warrant, which was *prima facie* a libel, and the defendants had justified under the order of the house. It is observable too, that *Burdett v. Colman*, (in K. B. 14 East, 163, in Dom. Proc. 5 Dow. 170,) shows that there is no distinction between the case of the speaker and that of a servant of the house.

Many instances have occurred in which such actions would have been brought if they had lain. In *Shirley v. Fagg*, 6 How. St. Tr. 1121, the defendant, a member of the House of Commons, being served with an order of the House of Lords to answer a petition of appeal by the plaintiff, referred to the House of Commons as to his privilege. The plaintiff was arrested under the speaker's warrant, but escaped. A fresh warrant issued against him; and his four counsel, Pemberton, Churchill, Peck, and Porter, were taken into custody by the serjeant at arms, and sent to the tower. Four writs of habeas corpus before the House of Lords were taken out; but the lieutenant of the tower refused to obey. The main question between the two houses was settled at a later period. No doubt the conduct of the House of Commons was wrong. Had there been any remedy by action, the parties arrested would have availed themselves of it, as they cannot be supposed to have been ignorant of their rights. But no such proceeding took place. The cases mentioned on the other side, of abuses of privilege, confirm this argument; the greater the abuses, the stronger is the argument from the absence of any proceeding for a remedy by action. Littleton, speaking of the statute of Merton, says (sect. 108; Co. Litt. 80 b.) that the not bringing an action where it might be brought if maintainable, is strong proof that no such action lies. The omission, in the present instance, cannot be accounted for by any dread entertained of the house, because no such feeling has prevented the suing out writs of habeas corpus.

Then, as to the cases which may be relied upon as supporting the jurisdiction of the common law courts. In *Atwyl's case*, 1 Hats. Pr. 48, (a) 17 Ed. 4, Atwyl, a member of the House of Commons, complained to the house that writs of *fi. fa.* and *ca. sa.* had been sued out against him in the Exchequer. What took place was a conference between the two houses, the result of which was an order by parliament, in the form of an act, with the royal assent, that the writs should be superseded till the end of that parliament, saving to the judgment creditor his execution after that. One object of this act was, that the judgment creditor might have justice; for, till stat. 1 Ja. 1, c. 13, a discharge by privilege put an end to the debt; though now, by that act, the debt is revived after the end of the parliament. (b) Therefore, in particular cases, it was customary to pass acts for preserving the creditor's remedy, when members were discharged by privilege. But no inference arises from this in favour of the power claimed for the common law courts. *Larke's case*, 1 Hats. Pr. 17, 8 H. 6, *Clerke's case*, 1 Hats. Pr. 34, 39 H. 6, and *Hyde's case*, 1 Hats. Pr. 44, 14 E. 4, are to be explained on

(a) This and the three following cases are from the parliament rolls.

(b) It is remarkable that in this statute, s. 2, it was thought necessary to make an express provision that no sheriff, &c., from whose custody any person taken in execution should be delivered by privilege of parliament, should be chargeable with "any action whatsoever, for delivering out of execution any such privileged person."

the same ground. In *The Prior of Malton's case*, 1 Hats. Pr. 12, 9 E. 2, (citing p. 20 of Prynne's Animadversions on 4 Inst.) an action was commenced against the defendants for arresting the prior by his horses and harness, on his return from parliament; the writ reciting that members ought to be free eundo et redeundo. What the result was, does not appear: the case, therefore, proves nothing. In *Trewynnard's case*, 1 Hats. Pr. 59, 36 & 37 H. 8, the sheriff was sued for an escape from final process; and the defendant pleaded that, while Trewynnard, the prisoner, was in his custody, he was discharged by the king's writ of privilege, as a member of the House of Commons, arrested while coming to parliament. The plea was demurred to; but there was no judgment: so that the case proves nothing. But an argument for the sheriff is extant in 1 Dyer, 61, b., containing this passage: "Although parliament should err in granting this writ, yet it is not reversible in another court, nor any default in the sheriff." In *Donne v. Walsh*, 1 Hats. Pr. 41, 12 E. 4, (from Prynne's Register, part 4, 752,) the defendant was sued in debt in the Exchequer. He pleaded a writ of privilege, which set out a custom, that neither members nor their servants, coming to parliament, ought to be arrested or impleaded; and averring that he was a servant of the Earl of Essex, so coming, &c., prayed judgment. The plaintiff, in his replication, prayed that the writ might be disallowed, for that there was no such custom. The barons consulted the judges of both the other courts, found that there was no such custom as to not being impleaded, disallowed the writ, and put the defendant to answer. Here the question arose incidentally; the action was not brought for an act done by the order of the house; but it merely involved incidentally a question of personal privilege. The same explanation applies to *Ryver v. Cosins*, 1 Hats. Pr. 42, 12 E. 4. In *Piedall's case*, (cited, 14 East, 47, from Prynne's Reg., part 4, p. 1213,) the houses, on conference, agreed that it was no breach of privilege to bind a member by recognizance to appear in the Star Chamber after the end of the parliament, for matters not connected with his character as a member. This proves nothing as to the present question. In *Cook's case*, 1 Hats. Pr. 96, 26 Eliz., (cited from Dewes's Journal; see also O. Bridgm. Judgments, 351,) a dispute arose between the lord chancellor and the House of Commons, whether members were privileged from being served with subpœna; and a search for precedents was directed, but no report was made during the parliament. And besides, that also was a mere question of personal immunity.

In *Benyon v. Evelyn*, O. Bridgm. Judgments, 324, the statute of limitations was pleaded in bar to assumpsit for goods sold and delivered. The plaintiff replied that defendant was a member of the House of Commons from the time of the promise to the death of King Charles I., when parliament was dissolved by such death; that, from thence to the Restoration, there was no Court of Chancery from which an original could issue, and no Court of Record of the king open; and that the action was brought within six years of 29th May, 1660. Rejoinder, that the cause of action, if any, accrued on the 10th July, 21 Car. 1, and that, from thence to the death of Charles I., and thence hitherto, the Court of Chancery and the superior courts at Westminster were open, &c. Sur-rejoinder, that the defendant was a member till the 30th January, 1649, so that the plaintiff could not sue an original or bill against him, and that, from thence till 29th May, 1660, there were no courts, &c.: to which

the defendant demurred. Here it was agreed that, even if the member had been privileged, the defence was not answered, stat. 21 Ja. 1, c. 16, containing no exception in such case. The dicta of BRIDGMAN, C. J., as to the privilege, were therefore extra-judicial, and a parade of authorities on the subject was unnecessary. Further, if privilege would have constituted a defence, the question would only have arisen incidentally: so that the dicta at most show merely that the courts may determine the question of privilege if it arise incidentally. BAYLEY, J. so understood the observations; *Burdett v. Abbot*, 14 East, 33. Further, it appears that BRIDGMAN did not believe that the house had passed a resolution declaring its breach of privilege to file an original against a member. BRIDGMAN relies upon *Trevelynard's case*, 1 Hats. Pr. 59, and others which have been already explained. He relies also on a case in the reign of Ed. 3, Yearb. Pasch. 39 Ed. 3, f. 14 A., (see Lib. Ass. 38 Ed. 3, f. 224 B. pl. 14,) saying that there the judges proceeded, notwithstanding a resolution and command to surcease. That case was assize of novel disseisin, in which the question was, whether the tenant was a bastard or not. The point was referred to the bishop, who certified (see Vin. Abr., Bastard (K), (L)) to the judges of assize that he was, stating the facts. The tenant caused it to be suggested in parliament that the bishop had certified against the common law, and prayed remedy. There was then a writ to the justices of assize to surcease; but they took the assize nevertheless, in right of the damages, and adjourned the parties to the Common Pleas. Then a writ came to them to cause the record to be brought to the council before the Bishop of L. and two other bishops, to try if the cause assigned by the bishop for bastardy were good. They adjudged the certificate good. Afterwards, because the justices of assize had taken the assize contrary to the writ, the chancellor reversed their judgment before the council, where it was adjudged as the bishop had certified, and ordered the record back into the Common Pleas. There it was adjudged that the plaintiff should recover, because the bishop had certified that the tenant was bastard. But it is said that the justices took no regard of the reversal before the council, because that was not a place where the judgment could be reversed. Now it does not appear that the writ to surcease, in this case, was issued by parliament. In Fitzherbert's, (see Fitz. Gr. Abr., Bastardy, pl. 8,) Brooke's, (see Bro. Abr., Bastardy, pl. 21,) and Rolle's (see 2 Roll. Abr. 592, l. 35, Triall (E.) pl. 1,) Abridgments, this case is cited merely to show that the judges consider themselves bound by the bishop's certificate, without regard to the grounds on which it proceeds. Even if the writ issued from parliament, the case does not support BRIDGMAN's doctrine that the courts will not obey a writ to surcease from proceedings against a member: for it does not appear that the tenant was a member. BRIDGMAN relies also on *Staunton v. Staunton*, Fitz. Gr. Abr. Voucher, pl. 119, and 2 Rot. Parl. 122 (14 Ed. 3.) That was formed on in the Common Pleas, where, a question arising upon an averment in the demandant's counterplea, he "sued to council in parliament" (which seems to mean that he took the opinion of the House of Lords,) whether the averment could be so made; and the Lords held that it could. A writ was then issued to the Common Pleas, reciting the opinion, and commanding them to go on. The judges differing, the case was again brought before parliament, which again directed the Common Pleas to proceed, and it was accorded in parliament that judgment should be given for the demandant. This was

done; but a writ of error was brought, so that the matter again came before the judges, notwithstanding the two resolutions. The case occurred in the reign of Edward III., at which time it was not unusual for the courts of law to consult parliament in cases of difficulty. All that the instance shows is that, at that time, the courts of common law would, in a case between party and party, hold themselves at liberty to give judgment contrary to the opinion of the Lords delivered in a quasi-judicial capacity. It has no connection with the point discussed by BRIDGMAN, or with the present question. There was no point of privilege involved.

In 1681 (33 C. 2,) Fitzharris, 8 How. St. Tr. 223, had been impeached for high treason; and the Lords resolved (a question having arisen whether such impeachment should be in the case of a commoner) that the case should be proceeded with in the ordinary course of law. The House of Commons passed a resolution against the resolution of the House of Lords: and, two days after, parliament was dissolved. Then Fitzharris, being indicted in this court, pleaded in abatement that an impeachment was depending: and the plea was overruled, and judgment of respondeat ouster given. The only point there determined was, that an impeachment in a parliament which was dissolved, did not abate an indictment in the common law courts. (a) That has nothing to do with any question of privilege. In *Knowles's case* (or *Lord Banbury's case*,) 12 How. St. Tr. 1167, (S. C. 2 Salk. 509, 1 Ld. Ray. 10,) the defendant was indicted for murder, as Charles Knowles, and pleaded in abatement that he was Earl of Banbury, which was no doubt a good plea. A replication, that he had petitioned the House of Lords to be tried by his peers as Earl of Banbury, and that the petition had been dismissed, was held bad on demurrer; and properly; for the proceeding of the Lords was *coram non jndice*, they having no jurisdiction in such cases unless on reference to them by the crown; in fact, the crown sometimes decides such cases upon the advice of its own law officers, as in the case of the Huntingdon peerage. This is therefore no authority on privilege. The attempt was to plead an adjudication, but no regular adjudication was shown. Neither house, as such, had any interest in the question.

In *Ashby v. White*, 2 Ld. Ray. 938, (S. C. 14 How. St. Tr. 695,) the question was one in which the Houses of Parliament had no interest: it turned, according to HOLT, C. J. on common and statute law. Three judges against HOLT, C. J. decided, in the King's Bench, that such action did not lie. On error, in the House of Lords, of the ten judges present, one doubted, five held that the action did not lie, and four that it did. It was decided by fifty lords against sixteen that it did lie; 2 Lord. Ray. 958. Lord MANSFIELD, in *Mihvard v. Serjeant*, note (b) to 14 East, 59, disapproved of the decision. But, at any rate, it has no bearing upon a case where an express resolution of the House of Commons is judicially before the court. This remark applies to later cases, in which it has been held that such action lies; but in none of which was there any conflict as to privilege between the house and a court of law; *Mihvard v. Serjeant*, note (b) to 14 East, 59, *Drewe v. Coulton*, 1 East, 563, note b *Fox v. Corbett*, (1784; cited 14 East, 62.)

The Duchess of Somerset v. The Earl of Manchester, (Prynne's Reg.

(a) In *Warren Hastings's case*, it was resolved by both houses, in 1791, that the dissolution of parliament does not abate a pending impeachment. See Parl. Hist. vol. 28, p. 1018, vol. 29, p. 514. As to publications on this subject, see 2 How. St. Tr. 1446, note.

Part 4, 1214, A. D. 1663,) is sometimes referred to for the dicta contained in it. There, in a case before the delegates, in which the validity of a will was in question, the defendant, being a peer, wrote a letter to the delegates demanding forty days' privilege, to put off the sentence, before the session of parliament. This letter the delegates might have disregarded entirely. They came, however to five resolutions, importing, first, that they would not notice a demand of privilege made by letter, but only one signified by writ of privilege under the great seal: secondly, that, when questions of privilege of parliament come legally before the courts, they are the proper judges to allow or disallow the privilege: thirdly, that privilege was not to be allowed to a party sued *alieno jure*: fourthly, that the earl had not privilege for forty days before the session: fifthly, that the judges were not bound to proceed, in courts of justice, according to the votes of either house in cases of privilege, but according to the known laws of the realm, their oaths and trusts: sixthly, that they might pass sentence without breach of privilege, the earl's personal attendance not being necessary. They passed sentence accordingly. But, of these resolutions, the first is clearly wrong, if meant to affirm that privilege can never be noticed except when there is a writ of privilege. The second, from the cases cited (*Donne v. Walsh*, 1 Hats. Pr. 41; see ante, p. 50; *Ryver v. Cosins*, 1 Hats. Pr. 42; see ante, p. 50,) appears to refer only to those instances where the question arises incidentally. The third is unimportant here. The fourth would alone have been sufficient to decide the case. The fifth is purely gratuitous, there being no resolution of the house before the delegates.

The decision in *The Duchess of Kingston's case*, 20 How. St. Tr. 355, against the conclusiveness of a former sentence, when disputed by a person not party to the suit in which it was given, cannot militate against the principle here argued for by the defendant.

In *Mr. Long Wellesley's case*, 2 Russ. & M. 639, a member of the House of Commons was committed by Lord Chancellor BROUGHAM for contempt in detaining a ward of Chancery: a committee of the house disallowed the claim; and the chancellor disallowed it also. The decision of the court was in accordance with the resolution of the house. In *Mr. Lechmere Charlton's case*, 2 Mylne & Cr. 316, Lord Chancellor COTTENHAM committed a member of the House of Commons for a contempt. The member petitioned the house: but the committee of privileges decided against his claim of privilege. The Lord Chancellor appears to consider the house the proper tribunal to decide the question, and does not say how he should have acted if their decision had been different. (a)

III. Assuming that this court were competent to inquire into the existence of the privilege, it may be shown that the power of printing and publishing reports and papers, though of a criminatory nature, for public information and benefit, has long existed. If the house has power to order the publication, it must follow as a necessary consequence that no action will lie; for criminatory matter published by lawful authority

(a) The attorney general here cited, in addition to the authorities before adduced by him from text writers, "*Lex Parliamentaria*, or a Treatise of the Law and Custom of the Parliaments of England" (1690), in which it is stated that the houses, though now sitting separately, continue one court; that the parliament gives law to other courts, and therefore ought not to receive it from them (p. 36, 37); and that "it doth not belong to the judges to judge of any law, custom, or privilege of parliament." (p. 9.)

cannot be a libel. The fact of sale for money can be no material ingredient in the offence; nor does it appear by the plea that the paper in question was sold. (b)

It is conceded that a publication confined to the use of members is lawful; yet the evil now complained of must result to the party inculpated, in an equal or greater degree, from this limited circulation. It is presumed that every member of the upper as well as the lower house may read it. If the language is not actionable *per se* as verbal slander, he may repeat it to others. The slander may thus obtain general publicity; yet not a copy can be sold, or shown to the party injured; and he is thus deprived of all means of vindicating his character.

That the law may not, in the case either of limited or of general circulation, afford a remedy by action, is no argument against the authority of the house; for there are many instances of injury without remedy by suit or indictment; the most opprobrious terms, within certain limits, may be used, in speech, to assail the character of man or woman, and yet the law afford no redress. The policy of the law excludes such a remedy; and the private injury is more than balanced by the public benefit. The difficulty of drawing the line between a limited and a general circulation is itself a proof that no distinction exists. How many copies are to be printed? Are the wants of a future house as well as the present to be provided for? What is to be done with the copies on a dissolution? Are the peers to have them? And, if they are, may copies be supplied to the judges, attorney and solicitor-general, and others summoned to attend the lords by writ? If the members of the House of Commons are alone to have copies, what use is to be made of them? May a member read his copy from the hustings in his own vindication. On his death, what are his executors to do with it? Are they to burn the copy, or will it be a devastavit to do so? Similar questions may be asked in the case of a member resigning his seat. On a dissolution, are all copies to be burnt? Is it indictable to deliver copies to public libraries, or to give them in exchange for other public papers to a foreign state, agreeably to a recent arrangement? Can a rule which it is impossible to obey, at least without preposterous results, be sanctioned by the law of the land?

There are three modes of proving the existence of privilege. 1. By the necessity of it. 2. By long usage. 3. By long acquiescence in it.

1. As to the necessity here. There may not be a physical necessity, as there is for permission to a member to enter the house and take his seat; but there is a like necessity to that which is recognized as the foundation of the more limited right of circulation among members. There is, in fact, no absolute necessity even for such limited privilege, since every member may be present, and may hear every paper and proceeding read over. But in practice this would be impossible, or so inconvenient that the house could not efficiently discharge its functions if this right to print for its own use were not allowed. Now it is the same kind of necessity which exists for the same mode of communicating information to the whole constituency. The theory of the constitution supposes a constant intercourse between the representative and the constituent. The constituent petitions of the house, and the house informs the constituent. This intercourse does not involve the publication of *all*

(b) It does not appear on the record that the selling is either complained of or confessed.

proceedings, but only of those which concern the constituents: some are necessarily secret. But even as early as the reign of Henry VIII. the chancellor, on a prorogation of the parliament, desired the members to report to their electors what had been done.

The parliament has been called omnipotent, 1 Bla. Comm. 161. It has powers of so extensive a nature that many measures, which it is competent for the legislature to introduce, would not be submitted to, if there were no means of explaining their object to the people, or pointing out their necessity. Thus the dissolution of monasteries was preceded by a publication of the abuses which were reported to prevail in them. The Exclusion Bill in the reign of Charles II.; the Regency Bills, George III.; the bills repeatedly passed for suspending the Habeas Corpus Act; the acts for the abolition of slavery, the reform of corporations, the amendment of the poor-laws, are also instances of great legislative changes, to which the people were to be reconciled by circulating among them information, or by the previous publication of reports which were in their nature criminatory. The report which gives rise to the plaintiff's action is another instance in which it was useful to explain, and justify to the public, the introduction of new regulations and additional restraints: one of these, viz. the exclusion of certain books from prisons, occasioned the reference to the plaintiff's book of which he now complains. The inquisitorial powers of the house cannot be exercised with effect, or with justice to accused parties, unless the right of publishing charges be allowed to it. In the case, a few years ago, of a magistrate, Mr. Kenrick, against whom certain charges were adduced in the house, the publicity of the investigation was as beneficial to the party himself as to others. The two houses may inquire into the competency or conduct of a judge, and address the crown to remove him: yet the public would doubtless be dissatisfied at the removal, unless the grounds of it were made known. Can it be maintained that the judge in such a case might sue the speaker for directing the publication of the evidence?

As to part of the proceedings, viz. the votes and many of the orders of the house, and the journals of both houses, there is an absolute necessity for publishing them. All persons are supposed to be cognizant, and are bound to take notice of them. Each house will notice the votes of the other. The orders in reference to private bills, election petitions, &c., have the force of law, and must be published in order that the people may know what they are bound to obey. The journals are *publici juris*. They are evidence in the courts. Any one may inspect and copy them. Those of the lords are records, and are so treated in all courts, though it may be doubtful as to the Commons' Journals. Will an action lie for criminatory matter entered in these journals? Against whom will it lie, the printer, the speaker, or the lord chancellor? If no action lies for matters contained in such votes, or in the journals, what distinction is there between them, and papers, like the reports, which have become part of the proceedings, and been published separately? Formerly the votes contained every thing, even the speeches of members. Petitions may be, and sometimes are, printed in a supplement to the votes. This very report might have been printed in the supplement, or entered on the journals in consequence of a debate arising on it: and, *ex concessio*, the journals may be printed for public use.

2. Then as to usage. In *Lake v. King*, 1 Saund. 133, the court said they would take judicial notice of the usage of parliament, after they

had informed themselves of it by inquiry. There is abundant evidence of such usage in the present case. Numerous instances are collected in the report of the committee of the House of Commons on this subject; (a) and there are many others to the same effect. The result is this:—Before the invention of printing, other modes must have been resorted to for publishing the proceedings of parliament. Statutes were formerly proclaimed in the county courts. There is no express proof of the usage to publish proceedings before July 30th, 1641; even the practice of printing for the use of members is not traced to an earlier period. From 1641 till 1680, the speaker from time to time appointed a person exclusively to print and sell specific papers; the form of appointment is seen in *Thompson's case*, 8 How. St. Tr. 1. In 1680 a general order was made, and this order has been renewed every session with the exception of 1702, when it was suspended for a short time. This applies only to general votes and proceedings: reports and miscellaneous papers have been printed under distinct orders; nor does it appear that the circulation has been confined to members. The numbers printed have usually far exceeded the number of members; and the sale, though not expressly authorized, has, in fact, always prevailed. If it be objected that the precedent originated with the long parliament, it may be answered, that it occurred before Charles I. left London for the north, during a period when a regular government was subsisting, and statutes were passed which are the law of the land. In 1690 a debate occurred on the subject of printing the votes, when it was unanimously agreed to persist in the practice; Mr. Secretary Jenkins alone objecting, not on the ground of illegality, but because it was “a sort of appeal to the people,” and was “against the gravity of this assembly;” 4 Parl. Hist. 1306. The orders for printing have been in two forms; one directs the printing generally, the other for the use of members. A debate has often arisen on the form to be adopted. Sometimes a limited circulation has been enlarged by a subsequent unlimited order. The expense of printing was formerly defrayed by the sale; since the expense has exceeded the receipt, the treasury has paid the deficiency. In one way or another the practice of sale has, in fact, prevailed for two centuries; there has never been any difficulty in obtaining copies; and reports, like those on the South Sea Bubble, the slave trade and municipal corporations, wounding the feelings of private persons, and which would have been deemed libels under other circumstances, have circulated without restriction during all that period.

3. Acquiescence is a third proof of the existence of the privilege. Except *Rex v. Williams*, 13 How. St. Tr. 1369, no instance of an action or indictment has been shown until the present plaintiff brought his action. There has been (as BULLER, J. said in *Le Caux v. Eden*, 2 Doug. 602,) a “universal silence in Westminster Hall.” The action, not the publishing, is an innovation. It is *primæ impressionis*, and supported by no analogy. What will be the consequences, if the speaker is to be held liable for such publications? Suppose a resolution of either house were to pass criminalizing the ministers of the crown, and were to be published in the minutes, the lord chancellor, speaker, and all others concerned, are liable to action or indictment. If the speaker refuses to

(a) “Report from the select committee on publication of printed papers; with the minutes of evidence, and appendix. Ordered, by the House of Commons, to be printed, 8 May, 1837.” See post.

authorise the publication of papers, the house may send him to the Tower: if he obeys, the party aggrieved may sue or indict him. The postage act, 42 G. 3, (stat. 42 G. 3, c. 63, s. 10; see stats. 7 W. 4, and Vict. c. 32, and c. 31,) by giving the power of sending votes and proceedings free from postage, recognised their general circulation; for it was not limited to the case of papers sent to members.

Among the objections which have been urged to this claim of privilege are:

1. That it alters the law of the land, by legitimating the sale of libels. This is a *petitio principii*; it assumes that the privilege is not the law of the land.

2. That the exercise of the right inflicts a wrong, and that there is no wrong without a remedy. This again is begging the question. It is not a wrong if lawfully done; and, as to the loss or inconvenience to the party, the law, in pursuit of a greater benefit, does not regard it. For the same reason, there is no redress for an innocent party unjustly indicted, unless malice and want of probable cause be shown; no action against a witness for evidence he has given; nor against counsel for what he says in the discharge of his duty. No action lies for commitment by either house, however arbitrary. The suspension of an officer by his commander is another instance of injury done with impunity. The postmaster-general is not liable for the loss of letters. Confidential communications; literary criticism; exhibiting articles of the peace containing matter of defamation, though false; impressment of seamen; are all examples of loss, pain, or injury, for which the policy of the law provides no remedy by action.

3. It is objected, that this privilege is not among those claimed by the house from the king at the beginning of every parliament. The answer is that the privileges are inherent in the house, and as ancient as the prerogative of the crown. The demand is a mere form, like the consent of the people asked for the sovereign at the coronation. They were never prayed for by the speaker until the reign of Henry IV.; and, when James I. asserted that they were enjoyed of mere grace and favour, the commons entered a protest on their journals, which was torn out by the king. (1 Com. Journ. 668, 18th Dec. 1621; 1 Hats. 78, 79. And see the authorities referred to in *Holiday v. Pitt*, 2 Stra. 986.)

4. Again, it is objected that the immunity claimed is unnecessary, and that the proceedings would be sufficiently circulated through the same medium as the debates. But there is a distinction between papers and debates. The former are published at discretion, and by the order of the house. The debates are published without authority, the house retaining its power of conducting them in secrecy for the purpose of protecting itself from the interposition of the crown.

5. It is said that all useful matter may be published without any libel. But the publication of some reports would be impossible if every thing offensive to the feelings were to be expunged. To leave blanks for names would only aggravate the mischief. It has been suggested that injured parties should be recompensed out of the public purse; but that would be an undue encouragement to the bringing of actions; and the suggestion is not applicable where parties have been indicted. The speaker, for instance, in such a case, could not be indemnified by money for an imprisonment.

6. It is objected that this privilege cannot exist by prescription, being

inserted in articles of the peace, "not only concerning the petitioners themselves, but many others," *Cutler v. Dixon*, 4 Rep. 14 b. Privilege has in like manner been extended to defamatory matter in an affidavit exhibited in court, *Astley v. Younge*, 2 Burr. 807; and to a complaint against an officer in the army, addressed by his creditor to the secretary-at-war, *Fairman v. Ives*, 5 B. & Ald. 642, (7 Eng. Com. Law Reps. 220,) where *Cleaver v. Sarraude*, 1 Camp. 268, was recognised. In *Rex v. Baillie*, 21 How. St. Tr. 1, a criminal information was refused for a statement, submitted to the Governors of Greenwich Hospital accusing persons connected with its management. A writ of forger of false deeds sued out against a peer was held not actionable, the suit being actually in a course of prosecution, *Lord Beauchamps v. Croft*, Dyer, 285 a, where *Buckley v. Wood*, 4 Rep. 14 b, a case similar in principle, is referred to in note (37). No action lies for an advertisement injurious to character, but published bona fide to obtain information; *Delany v. Jones*, 4 Esp. N. P. C. 191. In *Blackburn v. Blackburn*, 4 Bing. 395, (15 Eng. Com. Law Reps. 14,) a letter addressed to the pastor and deacons of an independent congregation, impeaching the moral character of one of their ministers, was held to be a libel; but it is clear that, if the statement had been made bona fide and without malice, it would have been held privileged. And, if communications of this nature, addressed to persons interested in them, are privileged, can it be said that a representation on so important a subject as that of prisons, delivered by the members of the House of Commons to the commons, their constituents, is actionable as a libel? A party may indeed be injured by the result of such a publication; but (as was before observed) there may be a loss without any right to compensation at law. Thus in *Stockdale v. Onychyn*, 5 B. & C. 173, (11 Eng. Com. Law Reps. 191,) it was decided that the publisher of a scandalous work could not recover damages against a person who pirated it; and in *Poplett v. Stockdale*, 2 Car. & P. 198, (12 Eng. Com. Law Reps. 87,) it was held that the printer of the same work could not recover against the publisher on a contract for printing it, the defence being its corrupt character.

The plaintiff in this case cannot demand that the privilege claimed by the house should be established by proofs of its existence. It is asserted on the same principle upon which *WILMOT, J.* in *Rex v. Almon*, (a) maintained the right of the common law courts to attach for contempt, as necessarily incident to their constitution, and coeval with their first foundation. On that principle, also, the judicial committee of the privy council, in *Beaumont v. Barrett*, 1 Moore's Rep. Priv. Council. 59, 76, upheld the power of the House of Assembly of Jamaica to commit for publishing a libel in breach of their privileges; and doubtless it would in like manner have recognised their authority to order a publication which they deemed to be for the general advantage, on the ground that whatever is requisite or beneficial for a legislative body in the exercise of its functions inherently belongs to it, and the right need not be supported by proof of user, or by prescription.

No instance can be found in which a publication by authority of either House of Parliament has been considered a subject of prosecution or civil action. *Rex v. Lord Abingdon*, 1 Esp. N. P. C. 226, (S. C. cited

(a) *Wilmot's Opinions and Judgments*, 254 And see the judgment of Lord Ellenborough in *Burdett v. Abbot*, 14 East, 137, 151.

in *Rez v. Creevey*, 1 M. & S. 274,) is not such an instance. The paper there published by the defendant (a speech which had been read by him in the House of Lords) was issued without the sanction of the house; no privilege claimed by them was involved in the prosecution. So in *Rez v. Creevey*, 1 M. & S. 273, the publication (of a member's speech) was not authorised by the house, but, on the contrary, was against its standing order. Lord ELLENBOROUGH there, referring to *Rez v. Wright*, 8 T. R. 293, said, "I will not here wait to consider whether that could be strictly called a proceeding in parliament. What was printed for the use of the members was certainly a privileged publication; but I am not prepared to say that to circulate a copy of that which was published for the use of the members, if it contained matter of an injurious tendency to the character of an individual, was legitimate and could not be made the ground of prosecution. I should hesitate to pronounce it a proceeding in parliament in the terms given to some of the judges in that case. But it is not necessary to say whether that be so or not; because this does not range itself within the principle of that case. How can this be considered as a proceeding of the Commons' House of Parliament? A member of that house has spoken what he thought material, and what he was at liberty to speak in his character as a member of that house. So far he was privileged: but he has not stopped there; but, unauthorised by the house, has chosen to publish an account of that speech in what he has pleased to call a more corrected form; and in that publication has thrown out reflections injurious to the character of an individual."

The only remaining authority is the dictum of Lord DENMAN, C. J. in the former case of *Stockdale v. Hansard*, 2 M. & R. 9. (a) In that action of libel, it was urged for the defendants at Nisi Prius that the matter complained of was privileged, being contained in a report published by order of the House of Commons. His lordship held that the order was no protection; but the question was not fully discussed; and, as the defendants had a verdict on the plea of justification, there was no further occasion to contest the point. But, as it now appears, the great body of authorities is adverse to his lordship's ruling. (b)

(a) S. C. in the Report of the Select Committee on publication of printed papers, 8th May, 1837. Appendix to Minutes of Evidence, No. 1, p. 65.

(b) The pleas in the above case of *Stockdale v. Hansard* and others were, 1. Not guilty. 2. A justification, alleging that the facts stated in the libel were part of a report made by the inspectors of prisons, and asserting the truth of that statement. Sir J. Campbell, attorney-general, for the defendants, insisted on the latter defence; but he also gave proof that the alleged libel was published and sold in pursuance of resolutions of the House of Commons, and contended, therefore, in the first instance, that the publication was privileged by their authority.—Lord DENMAN, C. J. said, in summing up: "On the third ground, namely, that this is a privileged publication, I am bound to say, as it comes before me as a question of law for my direction, that I entirely disavow from the law laid down by the learned counsel for the defendant. I am not aware of the existence in this country of any body whatever that can privilege any servant of theirs to publish libels of any individual. Whatever arrangements may be made between the House of Commons and any publisher in their employ, I am of opinion, that the publisher who publishes that in his public shop, and especially for money, which may be injurious, and possibly ruinous to any one of the king's subjects, must answer in a court of justice to that subject if he challenge him for a libel, and I wish to say so emphatically and distinctly, because I think that if, upon the first opportunity that arose in a court of justice for questioning that point, it were left unsatisfactorily explained, the judge who sat there might become an accomplice in the destruction of the liberties of the country, and expose every individual who lives in it to a tyranny that no man ought to submit to." His lordship then said, referring to *Rez v. Wright*, 8 T. R. 293, that that case was not applicable, and was no authority to prevent his stating the law as he now laid it down. He added: "Therefore my direction to you, subject to a question hereafter, is, that the fact of the House of Commons having directed Messrs. Hansard to pub-

Since the trial of that cause, the question of privilege, as applied to the point now before the court, has been referred to a committee of the House of Commons, appointed without reference to party; they have reported, with only one dissentient voice, in favour of the protection claimed by these defendants; (a) and their report has been adopted by the House of Commons. An opinion so delivered and adopted is entitled to weight in a court of law. And the court will remember the advice of Lord BACON, to a judge of the Court of Common Pleas, on his appointment: "That you contain the jurisdiction of the court within the ancient mere-stones, without removing the mark;" (b) and the dictum of ARBOTT, C. J. in *Ex parte Cowan*, 3 B. & Ald. 130, (5 Eng. Com. Law Reps. 239): "We wish not to be understood as giving any sanction to the supposed authority of this court to direct a prohibition to the lord chancellor sitting in bankruptcy." "If ever the question shall arise, the court, whose assistance may be invoked to correct an excess of jurisdiction in another, will, without doubt, take care not to exceed its own."

Curwood, in reply.

The authorities cited for the defendants establish the jurisdiction of this court to deal with questions of privilege. In the earliest cases, the House of Commons did not even venture to decide on their undoubted privileges, but appealed to the crown or to the House of Lords, who themselves took advice of the judges. *Thorp's case*, 1 Hats. Pr. 28; S. C. 13 Rep. 64, and others are instances of this. In early periods of history, the legislative and judicial characters of parliament are faintly distinguished, and the "law of parliament" is often the act of the united legislature. With the power and popularity of the commons, the privilege assumed by them has been extended and strengthened; but they have never set themselves in opposition to the law with success or credit. *Wilkes's case*, (see p. 45 ante,) was an example of such a conflict: there, to use the words of Lord Chatham, "under pretence of declaring law, the commons made it, and united in the same persons the offices of legislature, party, and judge." (c) So here, the commons, while they profess to declare the law of parliament, are in fact depriving the subject of his right of action, as was attempted in *Ashby v. White*, 2 Lord Ray. 938; S. C. 14 How. St. Tr. 695. It is impossible to avoid taking cognizance of privilege; for until inquiry and examination it cannot appear whether the case involves privilege or not. There is no power to procure a certificate to be made by the speaker, as the recorder certifies the customs of London. If privilege be part of the law, this court not only may notice, but is bound to know it. The doctrine, that the power inherent in the whole parliament belongs also to each component estate, is absurd,

lish all their parliamentary reports, is no justification for them or for any bookseller who publishes a parliamentary report containing a libel against any man." Report from the Select Committee, &c. (see p. 56, note (a), ante.) Appendix to Minutes of Evidence, No. 1, p. 68. Verdict for the plaintiff on the first issue; for the defendants on the second.

(a) The attorney general stated that the committee appointed was as follows:—Lord Viscount Howick, Sir Robert Peel, Mr. Attorney-General, Mr. C. W. Williams Wynn, Mr. Tancred, Sir William Follett, Mr. Charles Villiers, Sir Frederick Pollock, Mr. Roebuck, Lord Stanley, Sir George Strickland, Sir Robert Harry Inglis, Mr. Serjeant Wilde, Sir George Clerk, Mr. O'Connell. And that the resolution in favour of the privilege was agreed to by Sir G. Strickland, Sir F. Pollock, Mr. C. W. Williams Wynn, Sir W. W. Follett, Lord Stanley, Sir G. Clerk, Mr. Serjeant Wilde, Mr. Attorney-General, Mr. O'Connell, and Sir R. Peel: dissentiente Sir R. H. Inglis.

(b) Speech of Lord Bacon to Hutton, J., *Lord Bacon's Works*, vol. iv. p. 508, ed. 1803.

(c) Debate on the address, 1770; 16 Parl. Hist. 659.

for it would give to each a distinct power of legislation. The conclusiveness of the judgment of courts of exclusive jurisdiction is not denied: but the House of Commons has little, if any, jurisdiction, in the strict sense. It has none of the *indicia* or attributes of a court of justice. It cannot even examine witnesses on oath. It cannot adjudicate between A. and B. Even Lord KENYON, in *Re v. Wright*, 8 T. R. 293, relied upon by the defendant, admits the existence of cases in which this court would dispute the assumption of privilege. In *Burdett v. Abbot*, (see 14 East, 128,) Lord ELLENBOROUGH makes a similar concession. Whether the doctrine, established in that case, that a commitment for contempt is not examinable by any other court, be well founded, may be doubted and hereafter controverted; but on this occasion there is no need to dispute it. The distinction between incidental and direct cognizance is obscure; the more intelligible rule is, that the court must notice privileges whenever they come judicially before it. It is objected that the privileges of the house will be submitted to the decision of courts of quarter sessions, county courts, and other inferior jurisdictions. But, if privilege be part of the law, why should such courts be deemed disqualified from forming an opinion upon that as well as upon any other matter of law? Why is the same person to be presumed ignorant of parliamentary privileges when he presides at sessions, and cognizant of them as soon as he enters the House of Commons? It is urged that members must have free intercourse with their constituents, and every facility for inviting and communicating information. But to circulate calumny, and prohibit actions for it, cannot be a fit expedient for the discovery of truth or the diffusion of correct intelligence. With regard to past usage, it is worthy of observation, that one of the earliest instances of this appeal by the house to the people was on the occasion of raising troops to be employed against the king. The practice of unlimited publication for sale, openly and avowedly, only began as late as 1836; and already two actions have been the result. There is no pretence for putting this case on the footing of a confidential communication. What foundation of necessity, or what confidential character, can be discerned in the publication to all mankind of a report on the state of Newgate Prison? It is argued that courts are not to presume that powers of this kind will be abused. But this assertion of the legal impossibility of abuse is disproved by authentic records, which show that abuses have been great and frequent. Instances have been already enumerated, and the number might be easily increased. (a) And what security has the subject against the recurrence of scenes like those which occurred in the case of *Shirley v. Fagg*, 6 How. St. Tr. 1121, where the two houses, seised *per mi* and *per tout* of the whole inherent powers of parliament (according to the doctrine of

(a) The following case in the 1st vol. of the Commons' Journals, pp. 438, 440, 441, (also shortly stated in 1 Hats. Pr. 132,) was here cited:—

"Die Jovis 14 Junii 1610. Sir George Moore.—That D. Steward's man, privileged, was, for begetting a woman with child.—The warrant, signed by justices before the parliament, executed now,—Whether privilege or no? Committed to the committee for privileges.

"Die Saturni 16 Junii 1610. Sir Jo. Hollis,—Touching Mr. D. Styward.—Constable had a warrant under four justices of peace.—

"That he should have privilege; the parties to be discharged; and consideration after to be had, who shall pay it."

"Die Mercurii 20 Junii 1610.—Mr. D. Steward,—touching the arrest of his servant:—Moveth for the charges. Whether the reputed father, being taken by a justice's warrant, shall pay; or the constable that executed the warrant.—The constable could not discharge him,—Q. for the constable:—Resolved, not to pay it; but, the reputed father."

Sir Robert Atkyns,) made contradictory declarations of law, leaving the subject at a loss to know whose law of parliament was to be held authentic and conclusive? These absurdities and mischiefs are to be remedied only by declaring the law of parliament subject to the general law of the land, and holding the privileges of the house to be (as the prerogative of the crown ever has been) within the cognizance of the ordinary courts.

Cur. adv. vult.

The learned judges in Trinity term (May 31st,) 1839, delivered judgment seriatim.

Lord DENMAN, C. J.—This was an action for a publication defaming the plaintiff's character, by imputing that he had published an obscene libel.

The plea was, that the inspectors of prisons made a report to the secretary of state, in which improper books were said to be permitted in the prison of Newgate; that the court of aldermen wrote an answer to that part of the report, and the inspectors replied, repeating the statements, and adding that the improper books were published by the plaintiff. That all these documents were printed by and under orders from the House of Commons, who had come to a resolution to publish and sell all the papers they should print for the use of the members, and who also resolved, declared, and adjudged, that the power of publishing such of their reports, votes, and proceedings as they thought conducive to the public interest, is an essential incident to the due performance of the functions of parliament, more especially, &c.

"The plea, it is contended, establishes a good defence to the action on various grounds.

1. The grievance complained of appears to be an act done by order of the House of Commons, a court superior to any court of law, and none of whose proceedings are to be questioned in any way.

This principle the learned counsel for the defendant repeatedly avowed in his long and laboured argument; but it does not appear to be put forward in its simple terms in the report that was published by a former House of Commons.

It is a claim for an arbitrary power to authorise the commission of any act whatever, on behalf of a body which in the same argument is admitted not to be the supreme power in the state.

The supremacy of parliament, the foundation on which the claim is made to rest, appears to me completely to overturn it, because the House of Commons is not the parliament, but only a co-ordinate and component part of the parliament. That sovereign power can make and unmake the laws; but the concurrence of the three legislative estates is necessary; the resolution of any one of them cannot alter the law, or place any one beyond its control. The proposition is therefore wholly untenable, and abhorrent to the first principles of the constitution of England.

2. The next defence involved in this plea is, that the defendant committed the grievance by order of the House of Commons in a case of privilege, and that each house of parliament is the sole judge of its own privileges. This last proposition requires to be first considered. For, if the attorney-general was right in contending, as he did more than once, in express terms, that the House of Commons, by claiming any thing as its privilege, thereby makes it a matter of privilege, and also

that its own decision upon its own claim is binding and conclusive, then plainly this court cannot proceed in any inquiry into the matter, and has nothing else to do but declare the claim well founded because it has been made.

This is the form in which I understand the committee of a late House of Commons to have asserted the privileges of both houses of parliament: and we are informed that a large majority of that house adopted the assertion. It is not without the utmost respect and deference that I proceed to examine what has been promulgated by such high authority: most willingly would I decline to enter upon an inquiry which may lead to my differing from that great and powerful assembly. But, when one of my fellow subjects presents himself before me in this court, demanding justice for an injury, it is not at my option to grant or withhold redress; I am bound to afford it if the law declares him entitled to it. I must then ascertain how the law stands; and, whatever defence may be made for the wrongdoer, I must examine its validity. The learned counsel for the defendant contends for his legal right to be protected against all consequences of acting under an order issued by the House of Commons, in conformity with what that house asserts to be its privilege: nor can I avoid then the question whether the defendant possesses that legal right or not.

Parliament is said to be supreme; I most fully acknowledge its supremacy. It follows, then, as before observed, that neither branch of it is supreme when acting by itself. It is also said that the privilege of each house is the privilege of the whole parliament. In one sense I agree to this; because whatever impedes the proper action of either impedes those functions which are necessary for the performance of their joint duties. All the essential parts of a machine must be in order before it can work at all. But it by no means follows that the opinion that either house may entertain of the extent of its own privileges is correct, or its declaration of them binding. In the course of the argument, the privileges of the commons were said to belong to them for their protection against encroachment by the Lords. The fact of an attempt at encroachment may, then, be imagined; and we must also suppose that the commons would resist it. In such a case, the claims set up by the two houses being inconsistent, both could not be well founded, and an instance would occur of adverse opinions and declarations, while the real privilege, whenever it is ascertained, would certainly be the inherent right of parliament itself.

The argument here became historical; and we were told that, at the early period when *privilege was settled*, the three estates assembled, and embracing all the power of the state, never would have left their privileges at the mercy of a very inferior tribunal, especially when the king's judges were dependent on the crown, and removeable at its pleasure. I cannot accede to the inference. If, in those early times, the lords and commons had felt the enlightened jealousy of dependent judges which is here supposed, they would not have left them in that state of dependence, equally dangerous to the character of the judges and to the just rights of themselves and of all their constituents. But we have no proof whatever of the constitution of this country being framed on abstract principles: there cannot be a doubt that it adapted itself to the exigencies of the several occasions that arose, and gradually grew into that form which the ends of good government require. But, while I dispute the

fact of privileges being settled in the *aulia regia*, or any other supposed constituent assembly, on any given principle, or indeed at all, I am far from believing that the judges ever had, or ought to have, by law, the smallest power over parliament, or either house of parliament. The independence of parliament is the corner stone of our free constitution. The judges who invaded it in the reign of James the First and his son have justly shared with those who betrayed the rights of the people in the case of ship money the abhorrence of all enlightened men. But a mean submissiveness to power has not always been confined to the judges; the same dispositions belonged to parliament itself, and to both houses. When we remember the sentence pronounced against an unfortunate gentleman of the name of Floyd, (2 How. St. Tr. 1153,) for a slight offence, if it were one, against King James the First, in speaking of his daughter and son-in-law, we shall allow that the two houses had as little sense of independence as of justice. The commons resolved, declared, and adjudged, that his fortune should be confiscated, and his body tortured, his name degraded, and himself imprisoned for life. The lords rebuked the invasion of their privileges of punishing, for which the commons humbly apologised; but the sentence was carried into full effect; and can any one believe that these two houses, thus vying in obsequiousness and cruelty, could entertain good views on the constitutional independence of parliament? (See the debates, 8 How. St. Tr. 92 et seq. And the note at p. 92.)

Another reason for denying to the courts of law all power in matters of privilege was said to flow from their same supposed ancient jealousy of the Lords. "The Commons never would have tolerated such an inquiry, because the decision might then have come to be reviewed on appeal by the co-ordinate and rival assembly;" yet the attorney-general informed us, almost in the same breath, that the appellate jurisdiction of the Lords was of recent date, that it originally belonged to the whole parliament, and that it was long warmly contested with adverse declarations of privilege by the House of Commons. The case of *Burdett v Abbott*, 14 East, 1, in 1810, was an action brought against the speaker himself, for an act done by him in parliament by order of the House of Commons. The plaintiff questioned his right, and, by seeking redress in this court, eventually submitted their privilege to the decision of the House of Lords. At this very moment the defendant, as acting by order of the House of Commons, prays our judgment in this question of privilege, and the House of Commons instructs the attorney-general to appear as his counsel before us. He tells us, indeed, that we can only decide in his favour; but, if we do, the House of Lords may reverse that judgment next week. Such is the practice of the nineteenth century: yet we are gravely told that in the dark ages of our history the Commons were too enlightened to allow any discussion of their privileges in any court whose judgment may be questioned in the Lords.

But it is said that the courts of law must be excluded from all interference with transactions in which the name of privilege has been mentioned, because they have no means of informing themselves what these privileges are. They are well known, it seems, to the two houses, and to every member of them, as long as he continues a member; but the knowledge is as incommunicable as the privileges to all beyond that pale. It might be presumption to ask how this knowledge may be obtained, had not the attorney-general read to us all he had to urge on

the subject from works accessible to all, and familiar to every man of education. The argument here seems to run in a circle. The courts cannot be entrusted with any matter connected with privilege, because they know nothing about privilege; and this ignorance must be perpetual, because the law has taken such matters out of their cognizance. The old text writers, indeed, affirm the law and custom of parliament, although a part of the *lex terræ* to be, "*ab omnibus quæsitæ, à multis ignorata.*" This and other phrases, repeated in the law books, have thrown a kind of mystery over the subject, which has kept aloof the application of reason and common sense. Lord Holt (a) in terms denied this presumption of ignorance, and asserted the right and duty of the courts to know the law of parliament, because the law of the land on which they are bound to decide. Other judges, without directly asserting the proposition, have constantly acted upon it; and it was distinctly admitted by the attorney-general in the course of his argument. I do not know to whom he alluded as disputing the existence of any parliamentary privilege; no such opinion has come under my notice. That parliament enjoys privileges of the most important character, no person capable of the least reflection can doubt for a moment. Some are common to both houses, some peculiar to each; all are essential to the discharge of their functions. If they were not the fruit of deliberation in *aula regia*, they rest on the stronger ground of a necessity which become apparent at least as soon as the two houses took their present position in the state.

Thus the privilege of having their debates unquestioned, though denied when the members began to speak their minds freely in the time of Queen Elizabeth, and punished in its exercise both by that princess and her two successors, was soon clearly perceived to be indispensable and universally acknowledged. By consequence, whatever is done within the walls of either assembly must pass without question in any other place. For speeches made in parliament by a member to the prejudice of any other person, or hazardous to the public peace, that member enjoys complete impunity. For any paper signed by the speaker by order of the house, though to the last degree calumnious, or even if it brought personal suffering upon individuals, the speaker cannot be arraigned in a court of justice. But, if the calumnious or inflammatory speeches should be reported and published, the law will attach responsibility on the publisher. So, if the speaker, by authority of the house, order an illegal act, though that authority shall exempt *him* from question, his order shall no more justify the person who executed it than King Charles's warrant for levying ship-money could justify his revenue officer.

The privilege of committing for contempt is inherent in every deliberative body invested with authority by the constitution. But, however flagrant the contempt, the House of Commons can only commit till the close of the existing session. Their privilege to commit is not better known than this limitation of it. Though the party should deserve the severest penalties, yet, his offence being committed the day before a prorogation, if the house ordered his imprisonment but for a week, every court in Westminster Hall and every judge of all the courts would be bound to discharge him by *habeas corpus*.

Nothing is more undoubted than the exclusive privilege of the people's

(a) See *Reg. v. Paty*, 2 Ld. Ray. 1114, 1115. And the judgment of Lord Holt in that case, ed. 1837, p. 54. Also, *Ashby v. White*, 2 Ld. Ray. 956.

representatives in respect to grants of money, and the imposition of taxes. But, if their care of a branch of it should induce a vote that their messenger should forcibly enter and inspect the cellars of all residents in London, possessing more than a certain income, and if some citizen should bring an action of trespass, has any lawyer yet said that the speaker's warrant would justify the breaking and entering?

The Commons of England are not invested with more of power and dignity by their legislative character than by that which they bear as the grand inquest of the nation. All the privileges that can be required for the energetic discharge of the duties inherent in that high trust are conceded without a murmur or a doubt. We freely admit them in all their extent and variety; but, if, on a resolution of guilt voted by themselves, this grant inquest should not accuse but condemn, should mistake their right of initiating a charge for the privilege of passing sentence and awarding execution, will it be denied that their agent would incur the guilt of murder?

I will speak but of one other privilege, the privilege from personal arrest, which is both undoubted and indispensable. A distinction has been sometimes taken, but, in my opinion, does not exist in law, between one class of privileges as necessary for performing the functions of parliament, and another as a personal boon; both classes are, as I apprehend, conferred on grounds of public policy alone. The proceedings of parliament would be liable to continual interruption at the pleasure of individuals, if every one who claimed to be a creditor could restrain the liberty of the members. In early times their very horses and servants might require protection from seizure under legal process, as necessary to secure their own attendance; but, when this privilege was strained to the intolerable length of preventing the service of legal process, or the progress of a cause once commenced against any member during the sitting of parliament, or of threatening any who should commit the smallest trespass upon a member's land, though in assertion of a clear right, as breakers of the privileges of parliament, these monstrous abuses might have called for the interference of the law, and compelled the courts of justice to take a part. Suppose, then, in the celebrated case of *Admiral Griffin*, (a) that one who claimed a right of fishing in his ponds had brought an action here against the officer who seized him, who justified the imprisonment under the speaker's warrant, alleging his high contempt in daring to fish in a member's pond near Plymouth; would not the Court of Queen's Bench have been bound to inquire as to the privilege, and to declare that it did not and could not extend to such a case? I desire to put the further question, whether the decision of such cases could be at all varied by the house declaring, with whatever of solemnity or menace, that it was the ancient and undoubted privilege of parliament to do each and every one of the abusive acts enumerated.

Examples might be multiplied without limit; but the examples are said to be abuses, and to prove nothing against the use. It is also urged that abuse is not to be presumed; that the only appeal lies to public opinion. and that outrages like these would authorise resistance and amount to a dissolution of the government. I answer, that cases of abuse must be supposed, to test the truth of the principle now under discussion. I say, farther, that it is only in cases of abuse that the principle is required,

(a) P. 14, ante: in which case four persons were committed.

that, though the maxim be true, *ab abusu ad usum non valet consequentia*, it cannot apply where an abuse is directly charged and offered to be proved: that no presumption can be made against a fact established or admitted. Need I go on to add, that the appeal to public opinion, however successful, comes too late after the injury has been effected, and that to talk to an innocent sufferer of his right to consider the social compact as broken towards him, to throw off his allegiance, and resist the outrage perpetrated in the name of parliament, is language at least novel in a court of law?

We were, however, pressed with numerous authorities, which were supposed to establish that questions of privilege are in no case examinable at law. *Thorp's case*, 1 Hats. Pr. 28, from 5 Rot. Parl. 239; (S. C. 13 Rep. 63; see 4 Inst. 15; 14 East, 25,) was, as usual, first cited. The facts were, that the lords, in Edward the Fourth's time, consulted the judges respecting the privilege then claimed by a member of the common's house, and the judges at first declined to answer,—facts totally inconsistent with an anterior settlement of parliamentary privilege, especially on the footing of the jealousy felt by the commons towards the lords and the judicial authorities. The judges did ultimately waive their objection to declaring an opinion on a question of privilege; they declared it in parliament, and by parliament it was adopted. (a) Yet their reluctance to assume, in the first instance, the delicate office of interfering with the privilege of parliament, even at the request of the House of Lords, and the respectful and submissive language in which they, the interpreters of the law, avowed their deference to those who make it, have been construed into a judicial decision that in their own courts they would decline to enforce that very law when made, if either House of Parliament should obstruct and overbear it by setting up the most preposterous claim under the name of privilege. Often, undoubtedly, similar expressions have fallen from the judges; but they must be modified by the cases in which they occurred. A sentence from C. J. NORTH's judgment in *Barnardiston v. Soame*, 6 How. St. Tr. 1109, was read at the bar. The question being, whether an action on the case lay against the sheriff at common law for a double return of members to parliament, which he strongly denied, he said, in the course of his elaborate argument, "If we shall allow general remedies (as an action upon the case is) to be applied to cases relating to the parliament, we shall at last invade privilege of parliament, and that great privilege of judging of their own privileges." These words appear, at first sight, of extensive import indeed; but when we refer them to the subject then in hand, which was an action against a sheriff for his conduct in a parliamentary election, we shall perceive that they are far from making the large concession supposed. The right of determining the election of their own members is one of the peculiar privileges of the assembled commons, like all other proceedings for their own internal regulation. With respect to them, I freely admit that the courts have no right to interfere, nor, perhaps, any regular means of obtaining information. How they must deal with such points when actually brought before them, is another consideration. But the possible inconvenience that might arise from

(a) The proceeding in parliament seems (as to the detention of Thorp) to have been contrary to the suggestion of the judges. See the statement of the case at p. 31 of Hats. Pr. Vol. 1. And Mr. Hatsell's comments at pp. 33, 34. See *Ferre's case*, 1 Hats. Pr. 53. *Anon. Moore* 57. 1 Hats. Pr. 58.

permitting the action against the sheriff, if the courts should come into conflict with parliament in those points of unquestionable privilege in which parliament must have the sole power of declaring what its privilege is, furnishes no shadow of an argument for the proposition, that whatever subject either house declares matter of privilege instantly becomes such to the exclusion of all inquiry by the courts.

We were also reminded of the disparaging terms applied by the judges to their own authority, when Alexander Murray, in 1751, was brought before this court by habeas corpus; 1 Wils. 299. I have obtained a copy of the return, setting out a commitment by the House of Commons for a contempt in general terms: but it is not unworthy of remark, that FOSTER, J. founds his judgment on what was said by Lord HOLT, and treats it as a commitment for a contempt in the face of the house. The fact was so, but the return did not state it: and Lord ELLENBOROUGH observed, in *Burdett v. Abbot*, 14 East, 111, 148, that HOLT did not so limit the power of commitment for contempts. Twenty years later, Brass Crosby, Lord Mayor of London, brought himself before the Court of Common Pleas by habeas corpus; 3 Wils. 168; S. C. 2 W. Bl. 754. The lieutenant of the Tower returned, for the cause of his imprisonment, an adjudication by the House of Commons, that the Lord Mayor, being a member of the house, having signed a warrant for the commitment of a messenger of the house for having executed a warrant of the speaker, issued by order of the house, was guilty of a breach of privilege of the house. The Lord Mayor had manifestly committed a breach of privilege; the grounds of it are fully set out in the speaker's warrant; nothing could, therefore, be less needful or less judicial than the wide assertion of privilege that was volunteered by the Chief Justice. Yet, after all that he said respecting the indefinite powers of parliament, his decision rests on the simple ground that all courts have power to commit for contempt. Sir W. BLACKSTONE clearly showed, on the same occasion, that the return was good on acknowledged principles of law, and declared the power then exercised to be one which the House of Commons only possesses in common with the Courts of Westminster Hall. But it must be confessed that his remarks on the state of public feeling rather evince the spirit of a political partisan than the calmness and independence which become the judicial seat. We know now, as a matter of history, that the House of Commons was at that time engaged, in unison with the crown, in assailing the just rights of the people. Yet that learned judge proclaimed his unqualified resolution to uphold the House of Commons, even though it should have abused its power; rebuked the murmur and complaint which its proceedings had justly excited; deprecated as the last of misfortunes, and in terms which might lead to a supposition that he was at liberty to withdraw from it, a contest between the courts of justice and either House of Parliament, and, with reference to objections pressed against the mode of executing the warrant, worked himself up at length to the untenable position: "It is our duty to *presume* the orders of that house, and *their execution*, are according to law."

The two cases last alluded to were disposed of by the courts, without taking time to consider, and even without hearing counsel on one side. In the former, the Chief Justice LEE took no part, having been absent when Alexander Murray was brought here. I do not mean to insinuate that a longer consideration would have been likely to produce a different

result, being satisfied that the decision itself was right. But I do believe that, if the court had deliberated and paused, they would have employed more cautious language, and abstained from laying down premises so much wider than their conclusion required. Lord ELLENBOROUGH, (see 14 East, 111, 113,) when pressed with their authority, distinctly refused to bow to it, corrected some phrases ascribed to several judges in the reports of both cases, and placed a limitation on the doctrine laid down by Chief Justice DE GREY, without which it would have yielded to either House of Parliament the same arbitrary power over men's liberty that the doctrine of ship-money would have lodged in the crown over their property.

Lord KENYON was cited as holding language of the same self-denying import in *Rez v. Wright*, 8 T. R. 293, where Mr. Horne Tooke had applied for a criminal information against a bookseller, for publishing a copy of the report made by a committee of the House of Commons, which was supposed to convey a charge of high treason against Mr. Tooke, after he had been tried for that crime and acquitted. This application for leave to set the extraordinary power of the court in motion for the punishment of misdemeanors is at all times received with the utmost caution: the court, in exercising its discretion, often refuses the indulgence prayed. LAWRENCE, J. thought that the party was not libelled. "It is said, that this report charges him with being guilty of high treason, notwithstanding the verdict of a jury had ascertained his innocence; but that is not the fair import of the paragraph." This opinion, for which the learned judge gives his reasons, was alone sufficient to discharge the rule. But he proceeded to make other observations. He likened the publication of this report to that of a proceeding in a court of justice, and said he was not aware of that having been deemed a libel. To what degree such publications are justifiable, is still a question open to some doubt; there can be none, that without direct personal malice, it could not properly expose the publisher to a criminal information. LAWRENCE, J. remarked accordingly, "The proceedings of courts of justice are daily published, some of which highly reflect upon individuals; but I do not know that an information was ever granted against the publishers of them." He then remarks, with much good sense and liberality, that it is also greatly for the public benefit that the proceedings in parliament should be generally circulated; and though he adds "they would be deprived of that advantage if no person could publish their proceedings without being punished as a libeller," still he speaks with reference to the case before him, giving his reasons for concurring in the discharge of the rule for a criminal information, but not affecting to decide a legal question which did not arise.

GROSE, J. laid down no legal proposition in the judgment delivered by him. Lord KENYON certainly did; as certainly it was extrajudicial, and is open to investigation. The proposition asserted by him was, that no proceeding of either house of parliament could be a libel. But, with the highest reverence for that most learned judge, I must be allowed to observe that he here confounds the nature of the composition with the occasion of publishing it. Matter defamatory and calumnious, which would therefore found legal proceedings for a libel, may be innocently published by one who has legal authority to do so. His lordship says, "This is a proceeding by one branch of the legislature, and, therefore

we cannot inquire into it." If this be true, one branch of the legislature has power to overrule the law. Lord KENYON felt this, and denied the existence of such a power, adding, "I do *not* say that cases may not be put, in which we would inquire whether or not the House of Commons were justified in any particular measure." We cannot fail to see that the one sentence is in direct contradiction to the other. The latter puts an end to the claim to authorise any act without the agent's being subjected to any inquiry. It equally overthrows that doctrine of the subordination of courts, which would condemn the first criminal tribunal of England to silence and submission if either house should unhappily be induced to give their warrant to a crime.

Lord KENYON supposes a case, in which the court would "undoubtedly" pay no attention "to an injunction from the House of Commons;" and he seems to think the case too enormous to have been ever possible. "If, for instance, they were to send their serjeant at arms to arrest a counsel here who was arguing a case between two individuals, or to grant an injunction to stay the proceedings here in a common action." Yet those enormities, too gross to be thought possible, were the daily proceedings of the House of Commons in former times; nay, they fall short of the truth. Not only did that great assembly in Charles the Second's time placard Westminster Hall with injunctions to barristers (some of Lord KENYON's most illustrious predecessors) against daring to appear in the discharge of their duty to their clients, but they sent their serjeant at arms to arrest and imprison counsel, solicitors, and parties who had violated their privileges by presuming to appear at the bar of the highest court of appeal in the country. They may not have granted their formal injunction to stay proceedings in a common action; but they constantly decided the subjects of common actions as matters of privilege, solely because one of the parties interested happened to be one of their own body. If Lord KENYON had been chief justice in the days of Sir John Fagg and Dr Shirley, (6 How. St. Tr. 1121,) and either of them had sued out his writ of habeas corpus before him, and had appeared to be in Newgate for the offence of submitting his case to be argued in the House of Lords, it is plain that he would have inquired whether the house was justified in that particular measure, and would have restored the prisoners to freedom. Yet their resolution was "a proceeding by one branch of the legislature," "a proceeding of those who, by the constitution," were "the guardians of the liberties of the subject." This inconsistency in a person of Lord KENYON's wonderful acuteness, as well as other inaccuracies hereafter to be noticed, make one regret that the judgment in this case, like those before whom Murray and Crosby had been brought, was not more deliberately prepared. It was given on the instant, not in a full court, not after hearing both sides. It bears marks of haste, and, we cannot deny, of the excitement and inflammation which belonged to the extraordinary times in which it occurred.

I do not pretend to discuss at length the particulars of every case in which the doctrine of privilege is asserted; but two, of paramount magnitude and importance, cannot be passed over. Sir W. Williams was prosecuted (13 How. St. Tr. 1369, S. C. 2 Show. 417,) by ex officio information for an order signed by him as speaker, authorising the publication and sale of Dangerfield's Narrative, being a slanderous libel on James, duke of York, four years after that order had been given. His trial did not come on till the duke had ascended the throne; he pleaded

to the jurisdiction of the court, and that plea is admitted to have been properly overruled; he then pleaded as a justification the order of the House of Commons, and that plea was set aside without argument. He was fined 10,000*l.*, and afterwards the fine was reduced to 8,000*l.* He never questioned this sentence, nor has it been reversed by any court or by act of parliament; on the contrary, Lord KENYON, in the case last under discussion, appears to me to have considered it as good law; but, at the moment, his memory, in general so faithful, misled him as to the facts. He said, "the publication was a paper of a private individual, and under pretence of the sanction of the House of Commons an individual published." (8 T. R. 296.) Now, though the narrative was indeed the paper of a private individual, it was adopted by the house, who ordered its publication; the speaker did not publish as an individual, nor under pretence of their sanction, but as speaker, and by their direct command. It was, therefore, an act done in parliament. The proceeding was by consequence a breach of the fundamental privilege which exempts all that is there done from question. The affair was taken up by the convention parliament; the Bill of Rights refers to it; the judgment would probably have been reversed by parliament, like the attainders of Russel and Sidney, if the bill introduced for that purpose had not contained a most iniquitous provision for reimbursing the sufferer out of the estates of the attorney-general, which caused its rejection by the lords.

Even if this case were not bad law, it would be worthy of the severest censure: a prosecution by the crown of a single member of parliament for the misdeed of all, commenced years after, the defence indecently scouted from the court without a hearing, and the conviction followed by an excessive penalty. But in what respect can it be said to bear the least analogy to the present case? The speaker is not here sued: the sale of the present libel is not by the speaker, nor took place within the walls of parliament. If any officer of the house had been held innocent in disseminating that mass of atrocious falsehood, if any bookseller had been held justified in selling it, because the speaker ordered that it should be sold for the benefit of the libeller, that would have been indeed a case in point. But I find, in 3 Mod. 68, (*Rex v. Dangerfield*), that Dangerfield himself had been convicted and punished for this same publication; and of that sentence I do not find that the legality any more than the justice has ever been challenged; yet it is plain that the speaker's order under the authority of the house would have been as good a justification to him for publishing, as the resolution of the house can now be to the present defendant. These two cases afford the true distinction; *Rex v. Williams*, 13 How. St. Tr. 1369, was ill decided, because he was questioned for what he did by order of the house, within the walls of parliament. *Rex v. Dangerfield*, (3 Mod. 68), is undoubted law, because he sold and published, beyond the walls of parliament, under an order to do what was unlawful.

Lord Shaftesbury, in 29 Car. 2, (0 How. St. Tr. 1269; S. C. 1 Mod. 144; 3 Keb. 792,) sought his discharge from imprisonment in the tower on an order of the lords spiritual and temporal to keep him and two other lords in safe custody, "during his majesty's pleasure, and the pleasure of this house, for high contempts committed against this house." The return was open to serious objection, as may be seen in the long

arguments reported at p. 144, of 1 Mod. Of the three judges who remanded the earl, one said that the return, made by an ordinary court of justice, would have been ill and uncertain, but would not say what would be the consequence as to that imprisonment if the session were determined. The second said, "the return, no doubt, is illegal, but the question is on a point of jurisdiction, whether it may be examined here? This court cannot intermeddle with the transactions of the high court of peers in parliament, during the session," "therefore the certainty or uncertainty of the return is not material, for it is not examinable here; but if the session had been determined, I should be of opinion that he ought to be discharged." And the third, the chief justice, thought the court had no jurisdiction, for reasons unconnected with the continuance of the session. It is strange that the duration of the session, on which the judgments turn so much, is now held to be immaterial where the lords commit. This decision, which undeniably, and a fortiori, would give a sanction to many later ones, and many dicta touching privilege which arose on habeas corpus, is cited by Lord ELLENBOROUGH, in *Burdett v. Abbot*, 14 East, 147, without a comment. In *Rez v. Flower*, 3 T. R. 314, allusion is made to it by Lord KENYON, without considering its authority in point of law. Mr. Justice HOLROYD, when arguing Sir F. Burdett's case at the bar, (14 East, 62—70,) distinguished between that action, in which the nature of the contempt appeared in the plea, and the return to the habeas corpus stating the contempt in general terms; he distinguished also between an action and the proceedings by habeas corpus.

One feature of *Shaftesbury's case*, 6 How. St. Tr. 1269, is curious, though not perfectly singular: the very proceedings of the House of Lords, to which the Court of King's Bench yielded their entire acquiescence, were condemned by the same house, 19th November, 1680, as "contrary to the freedom of parliament," "derogatory to the authority of parliament, and of evil example and precedent to posterity." (6 How. St. Tr. 1310.) The order and proceedings were thereupon adjudged "unparliamentary from the beginning, and in the whole progress thereof, and therefore were all ordered to be vacated, that the same or any of them may never be drawn into precedent for the future." In the same manner, after Lord CAMDEN and the Court of Common Pleas had held Mr. Wilkes entitled to his release from custody before his trial on an indictment for libel, by reason of his privilege as a member of parliament, (19 How. St. Tr. 989,) the House of Commons came to a vote that themselves possessed no such privilege. (15 Parl. Hist. 1362.) By which authority in such cases should we be bound? By that of our own law books, our daily guides, which however would appear to refer us to the journals, or by that of the journals of the house, in which the *lex et consuetudo parliamenti* are treasured, but which are supposed to be hidden from our view. I think the attorney-general referred us to the latter, of which he had before assured us that we were ignorant. Yet in *Shaftesbury's case*, 6 How. St. Tr. 1269, these journals would overturn the authority of the court. So, in the Middlesex election contests between Wilkes and Luttrell, it is notorious that the law of parliament was laid down in the most opposite sense on different occasions by the House of Commons.

But, as to these proceedings by habeas corpus, it may be enough to say that the present is not of that class, and that, when any such may

come before us, we will deal with it as in our judgment the law may appear to require.

The attorney-general told us of another case in point in his favour, *Burdett v. Abbot*, 14 East, 1. We must then examine that case fully. The plaintiff committed a breach of privilege by the publication of a libel; the defendant, the speaker, stating the fact on the face of his warrant, committed him, by order of the house, to prison; an action was brought for this assault and false imprisonment. Did the House of Commons threaten the plaintiff, or his attorney, or counsel for a contempt of their privileges? On the contrary, by an express vote, they directed their highest officer to plead and submit himself to the jurisdiction of this court. When the suit was pending, did they entertain questions on the course of the proceedings, or resolve that they alone could define their own privileges, or declare that judges who should presume to form an opinion at variance with their's should be amenable to their displeasure? They suffered the cause to make the usual progress through its stages, and placed their arguments before the court. Their arguments were just; their conduct had been lawful in every respect. The court gave judgment in the speaker's favour. The grounds of the decision were, not that all acts done by their authority were beyond the reach of inquiry, or that all which they called privilege was privilege, and sacred from the intrusion of law, but that they had acted in exercise of a known and needful privilege, in strict conformity with the law.

Let us now see what was acknowledged by the court to be the privilege of the House of Commons. Lord ELLENBOROUGH, almost on opening his luminous commentary on all the learning so profusely poured out in the discussion, claims for the High Court of Parliament, and each of the houses of which it consists, "that authority of punishing summarily for contempts which is acknowledged to belong, and is daily exercised as *belonging, to every superior court of law*, of less dignity undoubtedly than itself." (14 East, 138.) This is the position established by him. The nucleus of Mr. Justice BAYLEY's careful argument is in these few words: "The House of Commons has not only a legislative character and authority, but is also a court of judicature." If, then, the house be a court of judicature, it must "have the power of supporting its own dignity as essential to itself; and without the power of commitment for contempts, it could not support its dignity;" p. 159. Sir V. Gibbs, the attorney-general, who argued for the defendant, took the same ground of justification; p. 85. It were "easy to show that every court in *Westminster Hall* has the same power of commitment for contempts, and that they could not exist long without such a power." "If, then, the right exist in *the courts of Westminster Hall*, upon what principle, it might then have been asked, could it be contended that the *same right* did not exist, and in the same degree, in the House of Commons?" (p. 86.) Such was the principle on which the Exchequer Chamber affirmed the judgment; (*Burdett v. Abbot*, 4 Taunt. 101;) and the question proposed by Lord Eldon in the House of Lords to the judges, before that tribunal of the last resort pronounced in favour of the House of Commons, confines it in the same manner. (5 Dow. 199.) The decision manifestly rests on the privilege to punish for contempt, inherent no doubt in parliament and in each house, whether regarded in the legislative or in the judicial capacity, but which it only possesses in common with the courts

of justice, and which was there exercised within the strictest bounds of common law.

This great case, solemnly argued at the bar, and on both sides with extraordinary learning and power, and in which the court evidently pursued their own inquiries in the interval between the arguments, presents a striking contrast to the rash and unmeasured language employed by former judges in *ex parte* proceedings, as writs of habeas corpus, and motions for criminal information. Lord ELLENBOROUGH and BAYLEY, J. carefully guard themselves against adopting such expressions, the former dissenting directly from Chief Justice DE GREY, the latter quoting without dissent the doctrine laid down by HOLT in *Regina v. Paty*, 2 *Ld. Ray.* 1115. With the same freedom, Lord ELLENBOROUGH commented in *Rex v. Creevey*, 1 *M. & S.* 273, on Lord KENYON'S dicta in *Rex v. Wright*, 8 *T. R.* 293.

To the assertion that the courts have always acquiesced in the unlimited claim of privilege, I have already stated enough to authorise me in opposing the contrary assertion. I proceed to prove its truth in other instances.

The phrases which I have selected for remark out of the cases cited are the exception, not the rule. From early times the spirit of English judicature has been more free and independent. Numerous cases were cited in the argument for the plaintiff, in *Burdett v. Abbot*, 14 *East*, 1, not required for the decision, except as they removed the preliminary obstacle to all discussion. They have been repeated in able tracts; most of them were criticised by the attorney-general. He sought, and successfully in some, to show that the question of privilege, under the circumstances, did not arise. But they are not cited for their circumstances; their use is to show that the courts exercised the right of examining matters supposed to be protected from their inquiry by privilege of parliament. For this purpose it is enough to enumerate, in the words of Prynne, *Regist. Part 4*, p. 815, "the cases of *Larke*, 1 *Hats.* 17, *Thorp*, *Ib.* 28, *Clerke*, *Ib.* 34, *Hyde*, *Ib.* 44, *Atryll*, *Ib.* 48, *Walsh*, *Ib.* 41, *Cosin*, *Ib.* 42, *Ferrers*, *Ib.* 53, and *Trewynnard*, *Ib.* 59, which (he says) the lord chief justice vouched, and insisted on in his learned argument of this case, to the great satisfaction of those of the long robe, and most auditors then present, as well members of the Commons House as others;" *Cook's*, *Ib.* 96, *Pledall's*, (cited 14 *East*, 47, from Prynne's *Reg. Part 4*, 1213,) and others might be added. 'The *Duchess of Somerset's case*, Prynne's *Reg. Part 4*, 1214, *Fitzharris's*, 8 *How. St. Tr.* 223, and others not necessary to be named, were of later date. The chief justice thus eulogised by Prynne was Sir O. BRIDGMAN, delivering the judgment of the court in *Benyon v. Evelyn*, (O. Bridgman's judgments, 324.) who brings this result out of his examination of ancient authorities. "That resolutions or resolves of either house of parliament, *singly*, in the absence of the parties concerned, are not so concludent to courts of law, but that we may (with due respect nevertheless had to those resolves and resolutions,) nay, we *must*, give our judgment according as we, upon oath, conceive the law to be, though our opinions fall out to be contrary to those resolutions or votes of either house." That Chief Justice BRIDGMAN took upon himself to decide on privilege is so clear from his own plain words, that the opinion of HOLT in *Ashby v. White*, 2 *Ld. Ray.* 938, *S. C.* 14 *How. St. Tr.* 695, and of HOLROYD, in arguing *Burdett v. Abbot*, 14 *East*, 49, cannot make us more certain of the fact. The

attorney-general does not deny the proposition, but would parry its effect, by showing that the circumstances appearing there raised no question of privilege, and that what he was pleased to style the parade of learning on the subject was misapplied. But the judge avowed his right and duty: if he invaded privilege of parliament, by laying down doctrines inconsistent with it, the invasion could not be less culpable because uncalled for by the cause in hand.

The next case to which I advert in truth embraced no question of privilege whatever; but, as one of the highest authorities in the state has thought otherwise, I shall offer some comments upon it; I mean *Jay v. Topham*, 12 How. St. Tr. 821. The House of Commons ordered the defendant, their serjeant-at-arms, to arrest and imprison the plaintiff for having dared to exercise the common right of all Englishmen, of presenting a petition to the king on the state of public affairs, at a time when no parliament existed. For this imprisonment an action was brought. The declaration complained, not only of the personal trespass, but also of extortion of the plaintiff's money practised by defendant under colour of the speaker's warrant. The plea of justification under that warrant, which could not possibly authorise the extortion, even if it could the arrest, was overruled by this court, no doubt with the utmost propriety, for the law was clear; Lord ELLENBOROUGH points this out in the most forcible manner, in 14 East, 109. Yet for this righteous judgment C. J. PEMBERTON and one of his brethren were summoned before the Convention parliament, when they vindicated their conduct by unanswerable reasoning, but were, notwithstanding, committed to the prison of Newgate for the remainder of the session. Our respect and gratitude to the Convention parliament ought not to blind us to the fact that this sentence of imprisonment was as unjust and tyrannical as any of those acts of arbitrary power for which they deprived King James of his crown. It gave me real pain to hear the attorney-general contend that the two judges merited the foul indignity they underwent, as they had acted corruptly in concert with the Duke of York. In support of this novel charge, he produced no evidence, nor any other reason but that the plea, as set out in Nelson's Abridgment, (a) appears to have been in bar, and not to the jurisdiction. But the Commons, who knew their own motives, made no such charge: the record produced there, on which the judges were said to have violated the law, exhibits a bad plea for the reasons assigned by Lord ELLENBOROUGH; and the judgment punished by the Commons could not have been different without a desertion of duty by the judges.

We have arrived at the Revolution, in which HOLT took a conspicuous part. He owed to it the seat which he filled with such unrivalled reputation. On three several occasions he found himself compelled to deal with questions of privilege, and on all he gave his judgment against the claim. I shall not dwell minutely on *Knolly's case*, (or *Knocles's case*, 12 How. St. Tr. 1167; S. C. 2 Salk. 509; 1 Ld. Ray. 10.) where he, with the whole court, came to a different conclusion from the House of Lords, as to the supposed Earl of Banbury's right to that title. The attorney-general asserted that that was no question of privilege, but merely whether an individual was a peer or not. One might have supposed that the issue, whether one claiming to be a member of either house

(a) 2 Nels. Abr. 1248. The plea there is that pleaded, not in *Jay v. Topham*, but in *Verdon v. Topham*. See 14 East, 102, note (a).

of parliament was such or not, had some relation to parliamentary privilege, especially when the restraint of his person on a criminal charge was involved in that question. The Lords considered it matter of privilege, and questioned the judges. But the matter, it seems, had not been formally referred to the House of Lords, and was not duly brought before them. They had, however, formally given judgment, and of that the court was informed. How could the court know that the Lords had proceeded extrajudicially, if utterly ignorant of parliamentary matters, or be permitted to inquire into their methods of proceeding, if their own subordinate station estopped them from questioning any act done by the paramount authority of a House of Parliament?

Without farther pressing *Knolly's case*, I confess it was not without difficulty that I could trust the evidence of my own senses, when the attorney-general set aside the authority of *Ashby v. White*, 2 Ld. Ray. 938, (S. C. 14 How. St. Tr. 695,) by declaring that it was not a question of parliamentary privilege. If not, the three justices who differed from the chief justice were strangely deceived: the chief justice himself misapprehended both their reasoning and his own. The House of Lords was mistaken in their view of the subject, when they adopted the chief justice's opinion against that of his three brethren. And the House of Commons was most of all ignorant of the truth, when (January 17th, 1704, 14 How. St. Tr. 696, three days after the Lords had reversed the judgment of the Queen's Bench) being "informed, that there had been an extraordinary judgment given in the House of Lords upon a writ of error from the Court of Queen's Bench, in a cause between Matthew Ashby and William White, wherein the privileges of the house were concerned," they brought the proceedings before them, and after great debate resolved, p. 776, that Ashby having, in contempt of the jurisdiction of the house, commenced such action, was *guilty of a breach of their privileges*, and that whoever should presume to do the like, and all attorneys, solicitors, counsellors, serjeants at law, soliciting, prosecuting, or pleading in any such case, "are guilty of a *high breach of the privilege of this house*." The Lords, (p. 799,) after full inquiry by a committee, resolved, on the other hand, "that the declaring Matthew Ashby *guilty of a breach of the privilege of the House of Commons*, for prosecuting an action against the constables of Aylesbury, for not receiving his vote at an election, after he had, in the known and proper methods of law, obtained a judgment in parliament for recovery of his damages, is an unprecedented attempt upon the judicature of parliament, and is in effect to *subject the law of England to the votes of the House of Commons*."

And now we are gravely informed that this case concerned not the privileges of parliament. If, however, the opinion of all the judges and of both houses, and of all historians and all lawyers till that assertion was made, be correct, then that case decided that the courts of law were not bound by the opinion of the Commons' House on matters of election, whereupon they claimed the sole right of judging, and had actually given judgment: but that the law must take its course, as if no such judgment had been given by the House of Commons, and no such privilege claimed. On this point the decision has never to my knowledge been impugned in any of our courts. Lord MANSFIELD is supposed to have dissented from it, but his doubt applies to the form of declaration (a) merely; and his

(a) See also, as to the opinion of Tracy, J., 2 Ld. Ray. 958.

own practice at the bar, (14 East, 59, note *b*.) of asking leave of the House of Commons to commence such actions, proves only his cautious desire to avoid and avert from his clients the doom denounced against Ashby, Paty, and their brother burgesses and others in *pari delicto*, their counsel and attorneys.

In the case commonly designated as *The Case of the Men of Aylesbury*, (*Regina v. Paty*, 2 Ld. Ray. 1105; S. C. 14 How. St. Tr. 849,) a question of the utmost difficulty and importance was brought before the same chief justice, and the court of Queen's Bench. The House of Commons, acting on the resolution just cited, pronounced those persons guilty of the breach of privilege there prohibited, and sent them to Newgate for a contempt in bringing their action. They sued out their *habeas corpus*. HOLT, in a judgment of the highest excellence, (*a*) gave such reasons for restoring them to liberty as it is easier to outvote than answer: the other three judges thought the adjudication of the House of Commons on a contempt brought before them could not be gainsayed in that proceeding. The judges of the other courts are understood to have concurred with the majority in the Queen's Bench; and the opinion just cited must be taken as that of eleven judges against one. But the other eight could only have stated their first impression, without publicity, and without hearing the argument. There is no satisfaction in dwelling on the angry contests between the two houses which ensued. The peculiarity of the circumstances leaves a doubt whether the law can be considered as settled by what then occurred. (See 14 East, 92, note *b*.) But, even supposing that this court would be bound to remand a prisoner committed by the house for a contempt, however insufficient the cause set out in the return, that could only be in consequence of the house having jurisdiction to decide upon contempts. In this case we are not trying the right of a subject to be set free from imprisonment for contempt, but whether the order of the House of Commons is of power to protect a wrong doer against making reparation to the injured man.

When the judges were supposed to have unanimously agreed to surrender their right of examining whatever may have been done by authority of parliament, some very important declarations by some of the most eminent among them must have been forgotten. Lord Chief Justice WILLES avowed the contrary resolution: "I declare for myself that I will never be bound by any determination of the House of Commons against bringing an action at common law for a false, or a double return, and a party injured may proceed in Westminster Hall notwithstanding any order of the house:" *Wynne v. Middleton*, 1 Wils. 128.

What was said by Lord MANSFIELD in the House of Lords, respecting the privileges of the other house in the Middlesex election, is the more weighty, because he was then upholding the privilege of the latter in election matters: (16 Parl. Hist. 653.) "Declarations of the law," said he, "made by either house of parliament, were always attended with bad effects: he had constantly opposed them whenever he had an opportunity, and in his judicial capacity thought himself bound never to pay the least regard to them." He exemplified this remark by reference to general warrants: although thoroughly convinced of their illegality, "which indeed naming no persons were no warrants at all, he was sorry to see the House of Commons by their vote declare them to be

(*a*) See "The judgements delivered by the Lord Chief Justice Holt," &c. from the original MSS., ed. 1837. Ante, p. 39, note (*b*).

illegal. That it looked like a legislative act which yet had no force nor effect as a law: for supposing the house had declared them to be legal, the courts in Westminster would nevertheless have been bound to declare the contrary; and consequently to throw a disrespect on the vote of the house." "He made a wide distinction between general declarations of law, and the particular decision which might be made by either house, in their judicial capacity, on a case coming regularly before them, and properly the subject of their jurisdiction." "Here" (that is in a case of election) "they did not act as legislators, pronouncing abstractedly and generally what the law was, and for the direction of others; but as judges, drawing the law from the several sources from which it ought to be drawn, for their own guidance in deciding the particular question before them, and applying it strictly to the decision of that question."

The dispute between the two houses in 1784, (see 24 Part. Hist. 494, et seq.) when the commons issued a kind of mandate to the treasury to suspend the payment of certain bills till the house should further direct, was in fact a struggle between the two great parties in the country. The lords by a large majority condemned that proceeding, and resolved (as the same house had almost in corresponding terms resolved at the close, in 1704, of the *Aylesbury case*)—"That an attempt, in any one branch of the legislature, to suspend the execution of the law, by separately assuming to itself the direction of a discretionary power, which, by an act of parliament, is vested in any body of men to be exercised as they shall deem expedient, is unconstitutional." (24 Parl. Hist. 497.) The doctrine was enlarged upon by Lord THURLOW, who spoke of the resolutions of the House of Commons in terms preserved by tradition, which there might be impropriety in repeating. The commons defended their resolution by asserting that, in fact, it did not fairly bear the import ascribed to it. Lords MANSFIELD and LOUGHBOROUGH took the same line in answering Lord THURLOW, both fully admitting with him, that the commons have no power to suspend the law by their resolutions. The former said, (ib. 517,) that "for either branch of the legislature to attempt to suspend the execution of the law, was undoubtedly unconstitutional." "It had been stated as a ground for voting it, (a) that the House of Commons had come to a resolution militating against a clause of the 21st of the present king. What then? A resolution of the House of Commons would not suspend the law of the land. A resolution of the House of Commons, ordering a judgment to be given in any particular manner, would not be binding in the courts of Westminster Hall."

Nor can I refrain from quoting the characteristic burst of sentiment with which Lord ERSKINE remarked in 1810 on some censure cast on Sir Francis Burdett, for appealing to the law against the legality of the speaker's warrant. "No man would more zealously defend the privileges of parliament, or of either house of parliament, than he should; and he admitted, that what either branch of the legislature had been for the course of ages exercising with the acquiescence of the whole legislature, would, in the absence of statutes," "be evidence of the common law of parliament, and, as such, of the common law of the land. The jurisdiction of courts rested in a great measure upon the same foundation: but besides that, these precedents, as applicable alike to all of them, were matters of grave and deliberate considera

(a) The proposed resolution of the House of Lords.

tion. they were, and must be, determined in the end by the law." "The contrary was insisted upon by the commons, when they committed Lord Chief Justice PEMBERTON for holding plea of them in his court; but so far was he from considering such a claim as matter of argument under this government of law, that I say advisedly, said his lordship, that if, upon the present occasion, a similar attack was made upon my noble and learned friend (Lord ELLENBOROUGH) who sits next me, for the exercise of his legal jurisdiction, I would resist the usurpation with my strength, and bones and blood." "Why was any danger?" "to be anticipated by a sober appeal to the judgment of the laws? If" "the judges had no jurisdiction over the privileges of the House of Commons, they would say they had no jurisdiction. If they thought they had, they would give a just decision according to the facts and circumstances of the case, whatever they might be." (16 Cobb. Par. Deb. 851.)

After these decisions in our courts, and these strong and vehement declarations of opinion, by some of the greatest luminaries of the law, it is too much to seek to tie our hands by the authority of all our predecessors.

On Lord BROUGHAM's judgment in the case of Mr. Long Wellesley, lately published by himself, (*Speeches of Lord Brougham*, vol. iv. p. 357,) and reported also in 2 Russel and Mylne, 639, for obvious reasons I shall observe but shortly. He adopted in its fullest terms the resolution expressed by C. J. WILLES, 1 Wils. 128, ante, p. 138, and carried it no farther, though his form of expression is perhaps more striking and forcible. "If instead of justly, temperately, and wisely abandoning this monstrous claim, I had found an unanimous resolution of the house in its favour, I should still, (and it is this which made me interpose to assure the counsel that I needed not the resolution of the House of Commons in favour of the Court of Chancery,) I should still have steadily pursued my own course, and persisted in acting according to what I knew to be the law." (*Mr. Long Wellesley's case*, 2 Russ. & M. 660.) A declaration the more remarkable, as proceeding from a judge long known as the champion of all popular rights, the jealous asserter of all the real privileges of that assembly, where his station and his services may be thought to place his name on a level, at least, with greatest of all those, either lawyers or statesmen, who have come after him upon the same stage.

It is indeed true that that avowal of opinion was no more necessary for the decision than perhaps the discussion of Chief Justice BRIDGMAN and the declared resolution of Chief Justice WILLES. But would that circumstance render the sentiment less offensive, if it really assailed the independence and dignity of the House of Commons? Quite the contrary. Yet there was no committee, no resolution, no menace.

Two admissions were made by the attorney-general in the course of his argument here, either of which appears to me fatal to his case. He very distinctly recognised the words of Lord MANSFIELD, that, if either house of parliament should think fit to declare the general law, that declaration is undoubtedly to be disregarded, adding that it should be treated with contempt. Now such declaration would be a proceeding of the house, and so above all inquiry.

Again, if the due subordination of courts is the guiding principle, the declaration, even if against law, by a superior court, demands respect and deference, if not acquiescence. But the declaration of general law may arise in the course of an inquiry respecting privilege: the claim

advanced by the report of the committee(a) is that the house is the sole and exclusive judge of the *extent* of its own privileges, and the attorney-general, in the same spirit, informed us, on the part of the House of Commons, of his and their "confidence that, when we should be informed that the act had been done in the exercise of a privilege, we should hold that we could no longer inquire into the matter." He warned us that, this being a question of privilege, we have no power to decide it; and told us that whenever either house claims to act in exercise of a power which it claims, the question of privilege arises. But, if the claim were to declare a general law, the attorney-general agrees that no weight would belong to it. Clearly then the court must inquire whether it be a matter of privilege, or a declaration of general law: as indisputably, if it be a matter of general law, it cannot cease to be so by being invested with the imposing title of privilege.

The other concession to which I alluded is, that, when matter of privilege comes before the courts not directly but incidentally, they may, because they must, decide it. Otherwise, said the attorney-general, there would be a failure of justice. And such has been the opinion even of those judges who have spoken with the most profound veneration of privilege. The rule is difficult of application. Lord ELLENBOROUGH and the court, as well as the defendant's learned counsel, felt it to be so, in *Burdett v. Abbot*, 14 East, 1. The learned report of the select committee states,(b) in direct terms, that they "have not been able to discover any satisfactory rule or test by which to ascertain in all cases whether the question of privilege would be deemed to arise *directly* or *incidentally*; there are many cases which might be decisively placed in the one class or the other, but there may be also very many which cannot be so assigned."—"Your committee are of opinion that the courts *have no jurisdiction* to decide upon privilege, either *directly* or *incidentally*, in any sense inconsistent with the independence and exclusive jurisdiction of parliament. If such a jurisdiction did exist of deciding *incidentally* upon privilege, uncontrolled by parliament, it would lead to proceedings as incongruous, and as effectually destructive of the independence of parliament as if the *direct* jurisdiction existed; a consequence which, together with the extreme uncertainty of the extent of the rule, makes it indispensably necessary that it should be investigated."

The report (pp. 13, 15; sects. 61, 65,) seems to consider that the question of privilege arose *incidentally* in the former trial between these parties, (see p. 61, note a, ante,) and points out very serious inconveniences that may flow from according to courts of justice this power of deciding incidentally. The opinion that the courts have no jurisdiction to decide upon privilege, either directly or incidentally, undergoes some apparent qualification by a reference to *the sense* in which the words are used. It appears that the courts have no such jurisdiction "in any sense inconsistent with the" "exclusive jurisdiction of parliament." (Report, &c., p. 13, s. 60.) I would not venture to speak with absolute certainty of the meaning of this passage; but I imagine that a body which has no jurisdiction to act in any sense inconsistent with the exclusive jurisdiction of another body can possess no jurisdiction at all. I think, then, it must be assumed, that the committee of the late House of Commons declare:

(a) "Report," &c. (cited, ante, p. 89, note (b);) page 17, sect. 78.

(b) "Report," &c. (cited, ante, p. 89, note (b);) page 13, sects. 59, 60.

that the courts have no jurisdiction whatever to decide even incidentally on any matter of privilege; their resolutions having reference to this preceding part of their report.

Now this power is denied to the courts by this report for the first and only time. Even the appendix (see appendix, No. 3, p. 25 to 29,) to it, which by being published by the same authority I know not well how to disjoin from it, returns to that same distinction between the direct and incidental occurrence of questions of privilege which the report and resolutions appear to repeal. It were to be wished that the late House of Commons had laid down their rule for the guidance of the courts in language less open to dispute as to its meaning; but we in this case must feel relieved from all embarrassment, by the frank acknowledgment of the attorney-general. If, then, we may be under the obligation of deciding on privilege, even though incidentally, it follows that we have some knowledge on the subject, or at least the means of obtaining knowledge. The report takes for granted that, if either house has actually come to a decision on the point thus raised, we should be bound to adhere to it: and the attorney-general insisted that, even if in the present case the question did but arise incidentally, we should be bound by the declaration of the law set forth by the house in any formal statement of its opinion.

Our duty would then be to interpret the law laid down by one house by discovering its meaning. But after ascertaining it as best we might from those stores of parliamentary learning from which we are pronounced to be excluded, we might possibly find that the other house (or the same house at another time) had come to an opposite declaration. What course must we then take? How reconcile the discrepancy? Perhaps it may be said that the fact is not to be presumed. I agree that it is not; but it exists at this moment with reference to the legal rights of parties in the matter that arose in *Ashby v. White*, 2 Ld. Ray. 938; S. C. 14 How. St. Tr. 695. This court could not decide the matter either way, without overruling what has been laid down either by Lords or Commons, and thus violating the privileges of parliament, and rendering ourselves amenable to just displeasure.

But suppose an entirely new point to arise, and some party litigating here to set up a claim of privilege never heard of before, as to which, therefore, neither house had ever framed a resolution.

Since, then, the courts may give judgment on matters of privilege incidentally, it is plain that they must have the means of arriving at a correct conclusion, and that they may differ from the house of parliament, as Holt and the Court of Queen's Bench differed from the Lords in the *Banbury case*, 12 How. St. Tr. 1167; as he did in *Paty's case*, 2 Ld. Ray. 1105; (S. C. 14 How. St. Tr. 849;) and as the same and many other of the judges as well as the lords did from the Commons in the case of *Ashby v. White*, 2 Ld. Ray. 938; (S. C. 14 How. St. Tr. 695;) and as I trust every court in Westminster Hall would have done, if an order of either house purporting to be made by virtue of the privilege of parliament had been brought before them as a justification for the imprisonment of a subject of this free state, for killing Lord Galway's rabbits, or fishing in Admiral Griffin's pool.

In truth, no practical difference can be drawn between the right to sanction all things under the name of privilege, and the right to sanction all things whatever, by merely ordering them to be done. The second

proposition differs from the first in words only. In both cases the law would be superseded by one assembly; and, however dignified and respectable that body, in whatever degree superior to all temptations of abusing their power, the power claimed is arbitrary and irresponsible, in itself the most monstrous and intolerable of all abuses.

Before I finally take leave of this head of the argument, I will dispose of the notion that the House of Commons is a separate court, having exclusive jurisdiction over the subject-matter, on which, for that reason, its adjudication must be final. The argument placed the house herein on a level with the Spiritual Court and the Court of Admiralty. Adopting this analogy, it appears to me to destroy the defence attempted to the present action. Where the subject-matter falls within their jurisdiction, no doubt we cannot question their judgment; but we are now inquiring whether the subject-matter does fall within the jurisdiction of the House of Commons. It is contended that they can bring it within their jurisdiction by declaring it so. To this claim, as arising from their privileges, I have already stated my answer: it is perfectly clear that none of these courts could give themselves jurisdiction by adjudging that they enjoy it.

3. I come at length to consider whether this privilege of publication exists. The plea states the resolution of the house that all parliamentary reports printed for the use of the house should be sold to the public, and that these several papers were ordered to be printed, not however stating that they were printed for the use of the house. It then sets forth the resolution and adjudication before set out. We know, by looking at the documents referred to at the bar, that this resolution and adjudication could not justify the libel complained of, because it was not in fact passed till after action brought. But, passing over all minor objections, I assume that the defendant has properly pleaded a claim, on the part of the house, to authorise the indiscriminate publication and sale of all such papers as the house may order to be printed for the use of its members.

The attorney-general would preclude us from commencing this inquiry. He protests against our taking any other step than that of recording the judgment already given in the Superior Court, and registering the edict which Mr. Hansard brings to our knowledge. But, having convinced myself that the mere order of the house will not justify an act otherwise illegal, and that the simple declaration that that order is made in exercise of a privilege does not prove the privilege, it is no longer optional with me to decline or accept the office of deciding whether this privilege exist in law. If it does, the defendant's prayer must be granted and judgment awarded in his favour; or, if it does not, the plaintiff, under whatever disadvantage he may appear before us, has a right to obtain at our hands, as an English subject, the establishment of his lawful rights and the means of enforcing them.

In the first place, I would observe that the act of *selling* does not give the plaintiff any additional ground of action, or right to redress at law, beyond the act of publishing. The injury is precisely the same in its nature, whether the publication be for money or not, though it may be much more extensively injurious when scattered over the land for profit. But the direction to *sell* is highly important in this respect, that public *sale* necessarily imports indiscriminate publication beyond recal or control, and holds out the same authority as a protection to every subord.

nate vender, who, by purchase from their printer and bookseller, is, like him, doing no more than giving effect to an order of the house.

How far it is strictly constitutional for either House of Parliament to raise money by sale or otherwise, and apply it to objects not specified by act of parliament, might require consideration on general grounds, but does not belong to the present season or place, in which we have only to deal with the manner in which the mutual rights of the parties before us in this action are affected.

It is likewise fit to remark that the defamatory matter has no bearing on any question in Parliament, or that could arise there. Whether the book found in the possession of a prisoner in Newgate were obscene or decent could have no influence in determining how prisons can best be regulated; still less could the irrelevant issue whether it was published by the plaintiff. The most advisable course of legislation on the subject is wholly unconnected with those facts: the inquisitorial functions would be exercised with equal freedom and intelligence, however they were found to be. And, if the ascertainment of them by the house was a thing indifferent, still less could the publication of them to the world answer any one parliamentary purpose.

The proof of this privilege was grounded on three principles,—necessity,—practice,—universal acquiescence. If the necessity can be made out, no more need be said: it is the foundation of every privilege of parliament, and justifies all that it requires. But the promise to produce that proof ended in complete disappointment. It consisted altogether in first adopting the doctrine of *Lake v. King*, 1 Saund. 131, that printing for the use of the members is lawful, and then rejecting the limitation which restricts it to their use. The reasoning is, "If you permit the number of copies to be as large as the number of members, the secret will not be confined to them." A strong appeal to justice and expediency against printing, even for the use of the members, what may escape from their hands to the injury of others, but surely none, in point of law, for throwing down the only barrier that guards the rest of the world against calumny and falsehood founded on *ex parte* statements, made for the most part by persons interested in running down the character assailed.

The case just alluded to drew a line, in the nineteenth year of Charles the Second, which has always been thought correct in law. The defendant justified the libel he had printed, by pleading that it was only printed for the use of the members. Much doubt at first existed whether the justification were good in law; the right of delivering copies for the use of the members of a committee being undisputed, but some of the judges questioning whether printing could be so justified. After an advisement of many terms and even of some years, Lord HALE and the court sustained the defence, because, being necessary to their functions, it was the known course in parliament to print for the use of members. But wherefore all this delay and doubt, if the house *then* claimed the privilege of authorising the publication of all papers before them? or how can we believe that the defendant would not have pleaded at first that privilege, when we find that he was admitted to have acted according to the course and proceedings of parliament, if it was then their understood right? This case occurred within a very few years of *Benyon v. Evelyn*, (O. Bridgman's Judgments, 324; Trin. T. 14 Car. 2,) which must have excited the attention of the house, and made them

vigilant in maintaining their privileges against improper interference from courts of law.

The supposed necessity soon dwindled, in the hands of the learned counsel, down to a very dubious kind of expediency; for is it not much better, said he, that a man defamed, and thence avoided by mankind, should know he has been the victim of a privileged publication, than remain ignorant by what means he has lost his place in society? A question over which many a man might wish to pause before he answered it. It is far from certain that he would become acquainted with the fact; he might be absent on business, or abroad in the service of his country; but the discovery when made would bring him small comfort, as it would show him that his enemy was too strong to grapple with, and that the door of legal redress must be barred against him for ever.

Another ground for the necessity of publishing for sale all the papers printed by order of the house was, that members might be able to justify themselves to their constituents, when their conduct in parliament is arraigned, appealing to documents printed by authority of the house. This is precisely the principle denied and condemned by Lord ELLENBOROUGH and the court in *Rex v. Creevey*, 1 M. & S. 273, a decision which it may now perhaps be convenient to censure as inconsistent with privilege, but which, founded on Lord KENYON's authority in *Rex v. Lord Abingdon*, 1 Esp. N. P. C. 226, has been uniformly regarded till this time as a just exposition of the law. But indeed it is scarcely possible for ingenuity to fancy a case in which a member, accused of any misconduct in his trust, should be able to vindicate himself by resorting to such documents. Then, on general grounds, the necessity of making the parliamentary conduct of members known to their constituents is urged, and the duty of the House of Commons to convey instruction to the people. The latter argument may be answered by asserting that the duty of general instruction resides in the whole legislature, and not in any single branch of it. The former argument proves too much; for the conduct of the representative is best disclosed by the share taken by him in the debates, which from all time up to the present moment have been, not only neither sold nor published by the house, but cannot be published by the most accurate reporter without his incurring the danger of Newgate for breach of privilege, and being exposed without justification to legal consequences.

It can hardly be necessary to guard myself against being supposed to discuss the expediency of keeping the law in its present state, or introducing any and what alterations. It is no doubt susceptible of improvement; but the improvement must be a legislative act. If we held that any improvement, however desirable, could be effected under the name of privilege, we should be confounding truth, and departing from our duty; and if, on such considerations, either house should claim, as matter of privilege, what was neither necessary for the discharge of their proper functions, nor ever had been treated as a privilege before, this would be an enactment, not a declaration; or, if the latter name were more appropriate, it would be the declaration of a general law, to be disregarded by the courts, though never, I hope, treated with contempt. It would also be the declaration of a new law; and the word "adjudge" can make no difference in the nature of the thing.

The practice, or usage, is the second ground, on which the attorney-general seeks to rest this privilege; and he has a warrant for his claim,

which, if well founded, is even stronger than any opinion of necessity: he refers to an act of parliament.

The postage act, (a) it seems, conveys all parliamentary proceedings to all parts of the empire free of expense. And, forasmuch as, when that act passed it, it was notorious that the votes and other proceedings contained matter criminating individuals, therefore, it was argued, the legislature must have intended to circulate such criminating matter. But the same act requires newspapers to be circulated free of postage: it was equally notorious that newspapers often contained libels; yet it was never contended that the postage act intended to give impunity to their circulation. In both cases it is clear that the act merely gave untaxed circulation to such proceedings and such papers as it was before lawful to circulate, leaving all questions of what is lawful in their former plight.

But "the practice has prevailed from all time." If so, it is strange that no vestiges of it are tracked to an earlier period than 1640, when the House of Commons, acting neither in a legislative nor in inquisitorial capacity, began to set up an authority independent of the crown, and hostile to it, which led to its gradually absorbing all the powers of the state. For near twenty years the house was taking this executive part, which they could not carry on but by publishing their votes and proceedings. At the Restoration they made some amends to the exiled king, by evincing their loyalty in the same manner; and their vows of allegiance and submission were also sold and published, as their manifestoes and levies of men and money against his father had been before. Thus does the practice appear to have originated in the Long Parliament, and to have been continued at the Restoration. The origin disproves the antiquity of the privilege, or its necessity for the functions of one of the three estates; no such necessity was thought of till one began to struggle against the other two for an ascendancy which reduced them to nothing. True it is, the practice of so printing and publishing has proceeded with little interruption till this hour. But the question is not on the lawfulness or expediency of printing and publishing in general; it is whether any proof can be found of a practice to authorize the printing and publication of papers injurious to the character of a fellow subject. Such a privilege has never been either actually or virtually claimed by either house of parliament; the notice of neither has been called to the fact of their giving publicity to writings of that character. What course they might have taken we cannot know, if a party thus injured had laid his grievance before them. Had their answer been, We claim the right to promulgate our judgment on cases within our jurisdiction, on which we have made inquisition, heard evidence and defence, and formed our judgment, —they would have referred to a state of things wholly different from that which is now before us. If they had said, we claim the privilege of ordering the printing of what we please, and of publishing all we print, however partial the statement, and however ruinous to individuals, the question of their right to justify the publisher would have been much the same as that which we have now under discussion.

The practice of a ruling power in the state is but a feeble proof of its legality. I know not how long the practice of raising ship-money had prevailed before the right was denied by Hampden; general warrants had been issued and enforced for centuries before they were questioned

in actions by Wilkes and his associates, who, by bringing them to the test of the law, procured their condemnation and abandonment. I apprehend that acquiescence on this subject proves, in the first place, too much; for the admitted and grossest abuses of privilege have never been questioned by suits in Westminster Hall. The most obvious reason is, that none could have commenced a suit of any kind for the purpose, without incurring the displeasure of the offended house, instantly enforced, if it happened to be sitting; and visiting all who had been concerned. During the session, it must be remembered that privilege is more formidable than prerogative, which must avenge itself by indictment or information, involving the tedious process of law, while privilege, with one voice, accuses, condemns, and executes. And the order to "take him," addressed to the serjeant-at-arms, may condemn the offenders to persecution and ruin. Who can wonder that early acquiescence was deemed the lesser evil, or gravely argue that it evinced a general persuasion that the privilege existed in point of law?

Besides, the acquiescence could only be that of individuals in particular hardships, brought upon themselves by the proceedings published. We have a right to suppose that a considerate discretion was fairly applied to the particular circumstances of each case; that few things of a disparaging nature were printed at all; that, where criminating votes were allowed to meet the public eye, they were justified as an exercise of jurisdiction upon matters properly brought before parliament, after patient hearing, and candid inquiry; that the imputations were generally true, and actions for libel would only have made them more public; and that, even where ex parte proceedings were printed to the annoyance of private persons, that minute suffering would be lost sight of in the general sense of an overwhelming necessity. All kinds of prudential considerations, therefore, conspired to deter from legal proceedings, and will fully account for the acquiescence; and the difference between the extent of publication formerly practised and the uncontrolled sale of all that the house may choose to print in order to raise a fund for paying its officers cannot fail to strike every unbiassed understanding.

I must add, that the evidence on this subject set forth in the report convinces me that publication has never been by way of exercising any of its privileges, nor the fruit of deliberation to what extent it ought to be carried and within what bounds restrained. With very different objects the practice was originally introduced; it grew imperceptibly into a perquisite; and I venture to believe that it was raised into a traffic, and a means of levying money, without much consideration.

The authority to which the attorney-general last appealed is one to which particular attention is due; I mean the report of the committee appointed by the late House of Commons to examine the subject. He spoke of it as a document of extraordinary weight demanding the utmost respect, as uniting the suffrages of the most distinguished statesmen and the most eminent lawyers. I feel just and high deference towards them all; towards none more than the learned person who pressed us with their authority, and whose argument at the bar so fully laid before us all that could possibly be urged in defence of their resolutions. That learned person gave us to understand that he had sacrificed many weeks of his valuable time in studying this great subject, and that in preparing his argument he had become perfectly convinced that his side was the side of truth. He must forgive me the remark, that this

conclusion would have affected me more if it had preceded, instead of following the report of that committee and the trial at Nisi Prius, and indeed the resolution of 1835. (Ante, p. 4.)

He also felt it right to remind us that members of that committee, though not now occupying judicial station, are sure to do so hereafter; that their fame may eclipse all their predecessors upon the bench, and their opinion embodied in the committee's report, ought to be as much venerated as if it had appeared some ages earlier,—in the reign, he added by way of example, of Queen Anne. I fully accede to the suggestion; but, in acting upon it, I could not refrain from considering the claims to confidence which the individual members might possess. My inquiry would not be confined to their learning and ability: I should ask of their habitual candour and love of truth; perhaps, too, of their political and personal connections. I might be driven to the invidious necessity of comparison: finding that some lawyers in the house had dissented from the committee, if I had found also in the minority such names as adorn the list of those who opposed the claim of privilege in the case of *Ashby v. White*, 2 Ld. Ray. 938, in the reign referred to, it might be difficult, notwithstanding any disparity of numbers, to be quite certain which way the balance of authority inclined.

One thing would aid me in this estimate; whether the first impression of those most conversant with constitutional law coincided with the resolutions in which they afterwards concurred. For in many cases the first thoughts of understanding men are the best, and the surest to bear the stamp of truth; subsequent consideration sometimes brings expediency into competition with rectitude, and expediency of all kinds, general and particular, public and personal. But, on the other hand, it would not be unimportant to know whether great lawyers, whose minds had not been particularly exercised in these matters, who might have been at first induced to concur in the resolutions, had seen reason to abide by them on maturer reflection. Some may have yielded to the extensive claims of privilege admitted by judges, and asserted by great living authority, who might afterwards renounce them as inconsistent with clear principles of law in daily operation. But I have been led too far in observing on the authority of the report, against which the plaintiff is, in truth, appealing to our judgment, and on which nothing but the learned counsel's claim of deference to it could have tempted me to make a single remark. Let me only add that, if its authority and force of reasoning had appeared to its composers so conclusive, there might have been more propriety and more grace in leaving them to their natural influence over our minds, than in resorting to language which would have exposed our motives to a darker suspicion than any pointed at by the attorney-general, if our opinion had happened to coincide with that of the House of Commons.

I cannot conclude without some reference to the particular circumstances which have attended this cause in its progress, and have been observed upon by the attorney-general at the close of his long discourse. I then mentioned the suddenness with which this great subject came upon me, when the newspapers informed that the issue which I was about to try had been made the topic of discussion in the House of Commons the night before. I must now add that when, on the trial, (ante, p. 101, note a,) it was proposed to make out a defence from the resolution so often cited, that resolution was unknown to me. The project

of the Honourable House to authorise the unrestricted sale of all their printed proceedings at so much a sheet, throwing off such a discount to wholesale purchasers, and appropriate the money to be raised to specific purposes, was what I never had anticipated, and (I own) could hardly believe. I thought it clear that such a course of proceeding could only be defended by asserting for one House of Parliament that sovereign power which is lodged in the Three Estates; an opinion confirmed by the report of the committee, by the attorney-general's argument, and by the concurrence of my learned brethren.

Some degree of censure was insinuated on my immediate declaration of an opinion not absolutely necessary for disposing of the cause, and which was said to have encouraged the plaintiff to commence this second action. I may be allowed to doubt this supposed consequence; for the second action was brought three months later, and immediately after the report of the committee had appeared. Perhaps, by some dexterous dealing with the points that arose at *Nisi Prius*, it might have been possible to avoid this painful collision, but not without shrinking from my duty to those parties who, whether necessarily or not, brought this question before me, and had a right to my opinion upon it; not without a poor compromise of the sacred principles of constitutional freedom. Besides, the delay would have implied a doubt where none was entertained, and would have been but a short postponement of the evil day: for similar questions must have sprung up in other quarters, and must have brought under examination the large rights now claimed.

I had indulged a hope that the resolution might have undergone revision, and have been found such as the House of Commons would not wish to continue on its journals. I had even some ground for believing that distinguished members of the committee itself entered upon the inquiry with opinions corresponding with my own; and I, for my own part, am at a loss to discover, in their printed report, or in the argument I have heard, any good reason for their conversion.

I cannot lament that I gave utterance at the proper season to sentiments of which I deeply felt the importance as well as the truth; nor can I doubt that a full consideration of the whole subject will lead to beneficial results. One thing alone I regret, a warmth of expression in asserting what law and justice appeared to me to require, which may have rendered it more difficult for the late House of Commons to recede from any claim which it had advanced.

I am of opinion, upon the whole case, that the defence pleaded is no defence in law, and that our judgment must be for the plaintiff on this demurrer.

LITLEDALE, J.—The first question for our consideration is, whether the resolution of the House of Commons, that they have the power to do an act, precludes the court from inquiring into the existence of the power; and whether we are in the situation of inquiring into this question at all; and whether we are not estopped by this resolution of the House of Commons, who have resolved, declared, and adjudged, that the power of publishing such of its papers, votes, and proceedings as it shall deem necessary or conducive to the public interests, is an essential incident to the constitutional functions of parliament, more especially to the Commons House of Parliament as the representative portion of it, operates(a)

(a) Some verbal inaccuracies, which will be found in the report of this judgment, occur in

so as to estop this court from proceeding to investigate the subject presented to the court upon this demurrer.

It is said that the House of Commons is the sole judge of its own privileges: and so I admit as far as the proceedings in the house and some other things are concerned; but I do not think it follows that they have a power to declare what their privileges are, so as to preclude inquiry whether what they declare are part of their privileges.

The attorney-general admits that they are not entitled to create new privileges; but they declare this to be their privilege. But how are we to know that this is part of their privileges, without inquiring into it, when no such privilege was ever declared before?

We must therefore be enabled to determine whether it be part of their privileges or not.

Suppose the House of Commons had resolved that they had a right to punish persons for an infringement on the property of members, as was declared in the case of Admiral Griffin, and also in other cases where claims of privilege have been set up, which are now abandoned by the attorney-general, could it be contended that, if the house were now to resolve that those privileges belonged to them, this court were estopped from inquiring into whether they were to be taken as part of the privileges? Or suppose that the house were to go much beyond what was formerly considered as privilege, and were to assert as privileges what, at the same time, I must admit, this House of Commons is never likely to assert, is this court to be shut out from inquiry into whether they have the privilege or not?

It is said that the proceedings in courts which have a peculiar jurisdiction of their own, and where the mode of proceeding is different from ours, cannot be inquired into in the common law courts; as in the case of judgments, and matters only cognisable in the ecclesiastical courts, and in the admiralty courts, and that therefore, as the House of Commons is exclusively the judge of its own privileges, we cannot inquire into it. But the cases are not similar; the ecclesiastical courts and the courts of admiralty give judgment or decide matters upon adverse claims of parties litigated in the courts. But this proceeding in the House of Commons does not arise on adverse claims; there are no proceedings in the court; there is no judge to decide between the litigant parties; but it is the House of Commons who are the only parties making a declaration of what they say belongs to them.

If the House of Commons were to make an adjudication upon the discussion of a claim of litigant parties on a subject within their jurisdiction, this court would be bound by it. If the House of Commons have the right to resolve what their privileges are, so as to estop the courts of common law from inquiring further into the subject, and in a case like the present to give judgment without more for the defendants, the House of Lords have the same power; and I will suppose that, the House of Lords having the same inquiry to make as to the state of prisons, under an act of parliament, and the very same reports and proceedings had been made to their house as have been made to the House of Commons, and that the House of Lords had resolved that copies of the papers should be printed for the use of the members of the House of Lords, and had

declared that no other copies should be printed: and supposing that upon the judgment now proposed by the attorney-general to be given for the defendants on the ground before mentioned, and that the record came by writ of error before the House of Lords, would that house consider themselves estopped from inquiring into the matter by the resolution of the House of Commons? I will not pretend to say what they would do; but I cannot bring my mind to any other conclusion, as to this part of the case, than that this court is not necessarily bound, by the mere assertion of the resolution of the privilege having been declared by the House of Commons, to give judgment for the defendants without further inquiry.

I would here make some remarks as to the mode in which the plea states the resolution of the House of Commons as to the privilege: "And the defendants further say, that the said Commons House of Parliament heretofore, to wit, on the 31st day of May, in the year last aforesaid, resolved, declared, and adjudged, that the power of publishing such of its reports, votes, and proceedings as it shall deem necessary or conducive to the public interests is an essential incident to the constitutional functions of parliament, more especially to the Commons House of Parliament as the representative portion of it." This plea states the fact of a resolution having been made by the House of Commons on the 31st day of May, 1837, which is after the day of the commencement of the action as stated in the demurrer book, and also after the day of the declaration. Now, if this was the averment of a new fact which had arisen after the commencement of the action, and it was a material fact to be introduced into the plea, it ought to be pleaded in bar of the further maintenance of the action, and not in bar of the action generally: but, as this statement of the resolution is only a statement of what is the privilege of the house, and which privilege, it is contended, is coeval with the House of Commons, I do not think it is such an allegation of a new fact as to say that the plea should be confined to be a bar of the further maintenance of the action.

Another remark on the plea is, that the resolution of the 13th of August, 1835, that the parliamentary papers printed by order of house should be made accessible to the public by purchase, which includes all the papers printed. Whereas the resolution of the 31st of May, 1837, is only as to such papers as should be deemed necessary and conducive to the public interest, which is more limited than the former resolution, and implies a selection, and might seem to require that the selection should be made after the resolution. But, as the plea states that the paper which is the subject of this action had been ordered to be printed, that implies that the house thought it necessary and conducive to the public interest that it should be published.

I have made these remarks as to the technicality of the plea. I will now consider whether the order of the house is a sufficient justification for the doing an act otherwise illegal? And whether the power does exist in this particular case.

I think that the mere statement, that the act complained of was done by the authority of the House of Commons, is not of itself, without more, sufficient to call at once for the judgment of the court for the defendants. The defendants have not pleaded to the jurisdiction of the court, but have pleaded in bar generally, and so as to raise a question of law or of fact according as the plaintiff chooses. And I think that this court is not

stopped from investigating the question of law raised by the demurrer to the plea in this action. And I think we are to inquire whether the act of publication has any thing to do with the privileges of the house; and, if it has, then whether those privileges, connected with the authority given to the defendants, amount to a justification. In the case of *Burdett v. Abbot*, 14 East, 1, no question was made as to the court being precluded from investigating the law of the case; they heard very long and laborious arguments, and gave judgment for the defendant. And so also we are at liberty here, and we are not shut out from hearing the arguments, and giving such judgment as we consider to be according to law. But it is said that the question of the privilege of the House of Commons comes directly before the court upon the pleadings, and that, therefore, upon all the authorities, it is quite clear it is not competent to this court to inquire into the question of privilege; and it is said that it is, in effect, the same case in principle as *Burdett v. Abbot*, 14 East, 1; and that it was there held that the defence, being founded upon the order of the house to do the thing complained of, raised the question of privilege directly, and that the court could not investigate the legality of that order. But this differs very materially from *Burdett v. Abbot*, 14 East, 1. That was an action against the speaker himself for an act done by him in the house. The act done by him was to commit an individual whom the house adjudged to be guilty of a contempt to the house, and who had been for that ordered to be taken into custody; and there was a specific order of the house as to the particular thing to be done; but this case is altogether different; these defendants are not members of the house, but agents employed by them; the plaintiff is a perfect stranger to the house; he has been guilty of no insult or contempt of the house, and there is no order of the house applicable to him. He stands, therefore, in the situation of a stranger to the house, complaining of persons who are no members of the house, but merely employed to distribute their papers.

Lord ELLENBOROUGH in the course of his judgment says, 14 East, 138, that, independently of any precedents or recognised practice on the subject, such a body as the House of Commons must a priori be armed with a competent authority to enforce the free and independent exercise of its own proper functions, whatever those functions may be. But yet, when he comes to the summing up the points for the consideration of the court, and gives the first part of his judgment, he says, first, that "it is made out that the power of the House of Commons to commit for contempt stands upon the ground of reason and necessity independent of any positive authorities on the subject: but it is also made out by the evidence of usage and practice, by legislative sanction and recognition, and by the judgments of the courts of law, in a long course of well-established precedents and authorities;" 14 East, 158.

Lord ELLENBOROUGH, therefore, takes into his consideration the reason and necessity of the order, as well as the evidence of usage and practice, and the legislative sanction and recognition by courts of law in a long course of well-established precedents and authorities. I admit that it is very difficult to draw the line between the question of privilege coming directly before the court, and where it comes incidentally: the shades of difference run into one another.

The decisions and dicta of the judges, who have said that the House of Commons are the only judges of their own privileges, and that the courts of common law cannot be judges of the privileges of the House

of Commons, are chiefly where the question has arisen on commitments for contempt, upon which no doubt could ever be entertained but that the house are the only judges of what is a contempt to their house generally, or to some individual member of it: but no cause has occurred where the courts or judges have used any expressions to show that they are concluded by the resolution of the House of Commons in a case like the present. I think, therefore, that the courts of Westminster Hall are not precluded from going into the inquiry from the decisions and dicta of judges. And I think that, when Lord ELLENBOROUGH summed up the reasons for his judgments in the way already pointed out, in a case where it is alleged that the question of privilege came directly before the court, we may follow his example, and endeavour to ascertain whether these resolutions of the house, on which the plea is founded, be founded on the reason and necessity of the order, as well as on evidence of the usage and practice, of the legislative sanction, and recognition of law in a long course of well established precedents and authorities.

After the very full and elaborate judgment of my Lord DENMAN, I do not think it necessary to go into the whole subject of privilege. There is no doubt about the right as exercised by the two Houses of Parliament with regard to contempts or insults offered to the house, either within or without their walls; there is no doubt either as to the freedom of their members from arrest, or of their right to summon witnesses, to require the production of papers and records, and the right of printing documents for the use of the members of the constituent body; and as to any other thing which may appear to be necessary to carry on and conduct the great and important functions of their charge.

In the case of commitments for contempts, there is no doubt but the house is the sole judge whether it is a contempt or not; and the courts of common law will not inquire into it. The greater part of these decisions and dicta, where the judges have said that the houses of parliament are the sole judges of their own privileges, have been where the question has arisen upon commitments for contempt, and as to which, as I have before remarked, no doubt can be entertained. But not only the two houses of parliament, but every court in Westminster Hall, are themselves the sole judges whether it be a contempt or not: although, in cases where the court did not profess to commit for a contempt, but for some matter which by no reasonable intendment could be considered as a contempt of the court committing, but a ground of commitment palpably and evidently unjust and contrary to law and natural justice, Lord ELLENBOROUGH says that, in the case of such a commitment, if it should ever occur (but which he says he could not possibly anticipate as ever likely to occur), the court must look at it, and act upon it, as justice may require, from whatever court it may profess to have proceeded.

I will confine my observations to what is the more immediate subject of this record, viz. the printing and publishing parliamentary papers.

There is no trace of printing parliamentary papers of any description prior to 1641, when there was a general resolution for printing the votes of the house; and at subsequent times reports and miscellaneous papers were printed under special resolutions, and measures taken for their distribution through the country. And it appears that these various papers have from time to time been allowed to be sold. Then it appears, by the plea, that there was a general resolution of the house in August 1835, that the papers which should be ordered to be printed should be sold.

and the price was directed to be as low as possible. The publication of which the action is founded was ordered to be printed, and was published by the defendants, who were the printers appointed by the House of Commons to print their papers; and it is upon these orders, and upon the resolution, that the defence is founded. Though the fact of any resolution for printing and distributing papers is not shown to have taken place at an earlier period than 1641, yet, from the difficulty there may be in now finding records and documents of an earlier date, I cannot say but that they were printed before that time: the votes were the first things ordered to be printed; but, though the reports and miscellaneous parliamentary papers do not appear to have been printed till a later period, yet, for the purposes of this argument, I think they may be all classed together: and I think, also, that the resolution that they might be sold makes no difference in principle; for, though the sale would cause a greater circulation, it is the distributing them to the country at large, whether by sale or gift, that raises the question. The fact of the printing and distributing parliamentary papers, even had it existed long before the conquest (when I say "printing," of course it is not appropriate language to the times before the introduction of printing,) would, of itself, prove nothing as to privilege. Parliament does not require any privilege to publish its own papers; any man may publish his own papers; but the only thing that can be called privilege is a right to publish defamatory papers, amongst the general mass which are to be distributed. As a pure abstract universal statement of privilege, I think it cannot be supported; it can only be so under some qualifications. These qualifications must necessarily be inquired into.

The first case that occurs, as to the publishing parliamentary papers of a defamatory nature, was that of *Lake v. King*, 1 Saund. 120, 131 *a*, where certain parliamentary papers had been printed which aspersed the character of Sir Edward Lake, who was vicar-general and principal official of the bishop of Lincoln. The defendant pleaded that he printed the papers in question for the use of the members of the House of Commons; and, on a demurrer to the plea, the court held the plea good, because it was the order and course of proceeding in parliament to print and deliver copies, &c., whereof they ought to take judicial notice. This decision was quite correct, as it was a privileged publication.

The next case that occurs as a case of litigation, is *Rez v. Williams*, which is reported in 2 Shower, 471, and much more fully in the thirteenth volume of the octavo edition of the State Trials, page 1369. It was an information against Sir William Williams, who was speaker of the House of Commons, for printing and publishing a paper called Dangerfield's narrative. He pleaded to the jurisdiction of the court, that, this paper being signed by him as speaker by the order of the House of Commons, the court of King's Bench had no jurisdiction over the matter. On a demurrer to this plea, it was over-ruled; and he afterwards pleaded nearly the same facts as a plea in bar. This plea in bar appears afterwards to have been withdrawn, and he was fined a very considerable sum of money. It was afterwards considered, when a change took place in the government, a very harsh proceeding against the speaker, and as being very much influenced by the politics of the times; and a bill was brought into parliament to reverse the judgment obtained: but for some reason the bill was never finally passed, and the judgment remained as it was.

There is no doubt but the proceedings against Sir William Williams were very harsh and improper; but I am by no means prepared to say that, as the original plea was pleaded to the jurisdiction of the court of King's Bench, and was not pleaded in bar, the judgment of the court was wrong. But, as to what one may consider the merits of the case with regard to Sir William Williams, if he had either pleaded not guilty, or a special plea in bar, which he had prosecuted to trial, I am not prepared to say but that he ought to have been acquitted, because the act of signing the order for printing the paper was done in the House of Commons by the order and authority of the house, and was therefore a proceeding in the house, and, as such, was a case of privilege which exempted him from both a criminal prosecution and an action.

I will now advert to the case of *Rex v. Lord Abingdon*, 1 Esp. N. P. C. 226. That was an information against Lord Abingdon for a libel contained in a paragraph in the public newspapers, stated to be part of a speech delivered in the House of Lords. Lord Abingdon urged that, as the law and custom of parliament allowed a member to state in the house any facts or matters, however they might reflect on an individual, or charge him with any crimes or offences whatsoever, and such was punishable by the law of parliament, he from thence contended that he had a right to print what he had a right to deliver, without punishment or animadversion. Lord KENYON said, "as to the words in question, had they been spoken in the House of Lords, and confined to its walls, that court would have no jurisdiction to call his lordship before them, to answer for them as an offence; but that in the present case, the offence was the publication under his authority and sanction, and at his expense."

I will next mention the case of *Rex v. Wright*, 8 T. R. 293, which is considered as an authority for the defendants. It was an application by Mr. Horne Tooke for leave to file a criminal information against the defendant for publishing a paragraph in the report of a committee of the House of Commons, imputing treasonable conduct to Mr. Tooke. The rule was refused, and Lord KENYON says, "it is impossible for us to admit that the proceeding of either of the houses is a libel; and yet that is to be taken as the foundation of this application." He afterwards adds, that "this is a proceeding by one branch of the legislature, and therefore we cannot inquire into it." But Lord KENYON does not admit the orders of the House of Commons to be conclusive on all occasions; for he says, "I do not say that cases may not be put in which we would not inquire whether or not the House of Commons were justified in any particular measure." Mr. Justice LAWRENCE assimilated the case to a publication of what took place in a court of justice. He says, "This case has been chiefly argued on two grounds: first, it is said that the report of the House of Commons is itself unjustifiable, inasmuch as it imputes a crime to the prosecutor, and deprives him of his privileges. It is said that this report charges him with being guilty of high treason, notwithstanding a verdict of the jury had ascertained his innocence; but that is not the fair import of the paragraph. It is possible that a man may have views hostile to the government and constitution of the kingdom, without being guilty of high treason, especially of the particular treason imputed to the persons there mentioned. It does not therefore follow that this report charges those persons with the same crime of which they had been before acquitted: but the chief ground taken by the prosecutor's counsel is, that

though the report of the House of Commons cannot itself be considered as a libel, the defendant, not acting under the authority of the house, may be indicted for publishing it, with a view to general circulation. It has been said, that the publication of the proceedings of courts of justice, when reflecting on the character of an individual, is a libel; to support which position, the case of *Waterfield v. The Bishop of Chichester*, 2 Mod. 118, has been cited," upon which he makes some observations. Then he goes on to state, "the proceedings of courts of justice are daily published, some of which highly reflect on individuals; but I do not know that an information was ever granted against the publishers of them. Many of these proceedings contain no point of law, and are not published under the authority or the sanction of the courts; but they are printed for the information of the public. Not many years ago, an action was brought in the Court of Common Pleas by Mr. Currie against Walter, (*Curry v. Walter*, 1 Bos. & Pul. 525,) proprietor of "The Times," for publishing a libel in the paper of "The Times;" which supposed libel consisted in merely stating a speech made by a counsel in this court, on a motion for leave to file a criminal information against Mr. Currie. Lord Chief Justice EYRE, who tried the cause, ruled that this was not a libel, nor the subject of an action, it being a true account of what had passed in this court; and in this opinion the Court of Common Pleas afterwards, on a motion for a new trial, all concurred, though some of the judges doubted whether or not the defendant could avail himself of that defence on the general issue." He then adds, "though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of courts of justice shall be universally known. The general advantage to the country in having these proceedings made public, more than counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings. The same reasons also apply to the proceedings in parliament: it is of advantage to the public, and even to the legislative bodies, that true accounts of their proceedings should be generally circulated; and they would be deprived of that advantage if no person could publish their proceedings without being punished as a libeller." Though, therefore, the defendant was not authorized by the House of Commons to publish the report in question, yet, as he only published a true copy of it, Mr. Justice LAWRENCE stated that he was of opinion the rule ought to be discharged. It is to be observed that the strict expression of Lord KENYON cannot be doubted for a moment: for he only says that it is impossible to admit that the proceeding of either house of parliament is a libel: of which there is no doubt; for the proceeding itself certainly is not a libel. And, with regard to Mr. Justice LAWRENCE's opinion as to the publication of the proceedings in a court of justice, the generality of his expressions is commented on by other judges in subsequent cases, and does appear to admit of some qualification.

Then it is contended upon this case that, if the judges thought the publication was privileged, though unauthorized by the House of Commons, à fortiori it would be so if it was so authorized. The case as far as it goes is certainly in favour of the defendants.

After that comes the case of *The King v. Creevey*, 1 M. & S. 273. There the defendant published a speech which he had made in parliament, reflecting on the character of an individual. Lord ELLENBOROUGH

says, "how can this be considered as a proceeding of the Commons House of Parliament? A member of that house has spoken what he thought material, and what he was at liberty to speak in his character as a member of that house. So far he was privileged: but he has not stopped there; but unauthorized by the house, has chosen to publish an account of that speech, in what he was pleased to call a more corrected form; and in that publication has thrown out reflections injurious to the character of an individual." The defendant was convicted, and, upon an application to the court for a new trial, Lord ELLENBOROUGH says, "If any doubt belonged to this question, I should be most anxious to grant the rule to show cause, in order to have the grounds of doubt more fully discussed and settled. But as I cannot find any thing on which to found even a colour for argument, except what arises from an extravagant construction put on a particular expression of Lord KENYON in the case of *The King v. Wright*, 8 T. R. 293, it would be to excite doubts, and not to settle them, if we were to grant the rule. What Lord KENYON there said was this,—'That it was impossible to admit that the proceeding of either of the houses of parliament was a libel; and yet that was to be taken as the foundation of the application made in that case.' I will not here wait to consider whether that could be strictly called a proceeding in parliament. What was printed for the use of the members was certainly a privileged publication; but I am not prepared to say that to circulate a copy of that which was published for the use of the members, if it contained matter of an injurious tendency to the character of an individual, was legitimate, and could not be made the ground of prosecution. I should hesitate to pronounce it a proceeding in parliament in the terms given to some of the judges in that case. But it is not necessary to say whether that be so or not; because this does not range itself within the principle of that case. How can this be considered as a proceeding of the Commons House of Parliament? A member of that house has spoken what he thought material, and what he was at liberty to speak in his character as a member of that house. So far he was privileged: but he has not stopped there, but unauthorized by the house, has chosen to publish an account of that speech in what he has been pleased to call a more corrected form; and in that publication has thrown out reflections injurious to the character of an individual. The only question is, whether the occasion of that publication rebuts the inference of malice arising from the matter of it. Has he a right to reiterate these reflections to the public; and to address them as an oratio ad populum in order to explain his conduct to his constituents? There is no case in practice, nor I believe any proposition laid down by the best text writers on the subject, that tends to such a conclusion. The case of *Rex v. Wright*, 8 T. R. 293, indeed determined that a proceeding in parliament could not be deemed libellous; but that does not warrant a publication of it in every newspaper, as was held in *Rex v. Lord Abingdon*, 1 Esp. N. P. C. 226. As to *Curry v. Walter*, 1 Bos. & Pul. 525, it is not necessary for the present purpose to discuss that case: whenever it becomes necessary, I shall say that the doctrine there laid down must be understood with very great limitations; and shall never fully assent to the unqualified terms attributed in the report of that case to EYRE, C. J." "In *Lake v. King*, 1 Saund. 120, 131 a, the judgment of Lord HALE and of the other judges was founded upon this point, viz. that it was the order and course of proceedings in parliament to print

and deliver copies, of which the court ought to take judicial notice. In order, therefore, to bring this case within the rule in *Lake v. King*, 1 Saund. 120, 131 a, we ought to find that it is the order and course of proceedings in parliament, that members should print their own speeches; and that this court will take judicial notice of such a course of proceeding. The very statement of the proposition shows it to be untenable. It is therefore neither within *Lake v. King*, 1 Saund. 120, 131 a., nor *Rex v. Wright*, 8 T. R. 293, giving to that case its full effect; and even if it were, perhaps the court would lay down the doctrine with somewhat more limitation than is to be found in that case." Mr. Justice BAYLEY says, "If the case admitted of any doubt I should be desirous of granting a rule. But the case is without difficulty. A member of parliament has undoubtedly the privilege for the purpose of producing parliamentary effect to speak in parliament boldly and clearly what he thinks conducive to that end. He may even for that purpose, if he thinks it right, cast imputations in parliament against the character of any individual; and still he will be protected. But if he is to be at liberty to circulate those imputations elsewhere, the evil would be very extensive. No member, therefore, is at liberty to do so. In *Lake v. King*, 1 Saund. 120, 131 a, such was the impression of the lawyers of that day. There the defendant did not justify the printing and delivering the petition to divers subjects, &c. generally, but to divers subjects being members of the committee appointed by the Commons; and such publication was held justifiable, because it was according to the order of proceedings of parliament and their committees. But it is not contended to-day that it is according to the course and order of parliament for members to communicate their speeches to the printers of newspapers, in order to give them to the world in a more corrected form. If any misrepresentation respecting them should go forth, there is a course perfectly familiar to all members, by which such misrepresentations may be set right, viz. by complaining to the house of the misrepresentation, and having the author of it at the bar to answer such complaint: therefore it is not necessary for the purpose of correcting the misrepresentation that a member should be the publisher of his own speech. It has been argued that the proceedings of courts of justice are open to publication. Against that as an unqualified proposition I enter my protest. Suppose an indictment for blasphemy, or a trial where indecent evidence was necessarily introduced, would every one be at liberty to poison the minds of the public by circulating that which for the purposes of justice, the court is bound to hear? I should think not: and it is not true, therefore, that in all instances the proceedings in a court of justice may be published." Mr. Justice LE BLANC says: "As to the right of a member of parliament to speak in parliament what is defamatory to the character of another, that sitting in a court of justice we were not at liberty to inquire into that; because every member had liberty of speech in parliament: but when he published his speech to the world, it then became the subject of common law jurisdiction; and the circumstance of its being accurate, or intended to correct a misrepresentation, would not the less make him amenable to the common law in respect of the publication."

Now these remarks in *Rex v. Creevey*, 1 M. & S. 273, very materially neutralize the opinions of Lord KENYON and Mr. Justice LAWRENCE in *Rex v. Wright*, 8 T. R. 293: but after all, none of the cases, *Rex v. Lord Abingdon*, 1 Esp. N. P. C. 226, *Rex v. Wright*, 8 T. R. 293, and

Rex v. Creevey, 1 M. & S. 273, were publications under the orders of the house, and do not affect the question of privilege, and therefore I only consider them as declaring the opinion of judges on publications to the public at large of what has occurred in parliament.

I would also take this opportunity of referring to the argument raised as to the publication of trials in courts of law, and which, it has often been stated, is justifiable though they may contain matter defamatory to the character of individuals. I am by no means prepared to say that, as a general proposition, they may be justified. Besides the opinions of Lord ELLENBOROUGH, Mr. Justice BAYLEY, and Mr Justice LE BLANC, as before expressed, I may refer to the case of *Stile v. Nokes*, 7 East, 493, and *Rex v. Mary Carlisle*, 3 B. & Ald. 167, (5 Eng. Com. Law Reps. 252;) *Lewis v. Walter*, 4 B. & Ald. 605, (6 Eng. Com. Law Reps. 535;) and *Flint v. Pike*, 4 B. & C. 473, (10 Eng. Com. Law Reps. 380,) that it must not be understood that on all occasions the publication of trials which contain matter defamatory of the character of individuals can be justified.

It is said that it is proper that the members of the house should have the right to send copies of all the parliamentary papers to their constituents, to justify themselves in case their constituents should find any fault with their conduct in parliament. If the member whose conduct is blamed by his constituents wishes to vindicate his conduct, he may send what parliamentary papers he pleases, provided they do not contain any criminatory matter of individuals; but I think it can never be considered as justifiable to publish defamatory matter of other persons to justify his own conduct in parliament.

As to the general information to be given to the public of all that is going on in parliament, I cannot conceive upon what ground that can be necessary. I do not consider as a matter of right that the public should know all that is going on in parliament. But, as to the right of communicating the proceedings in parliament to the public, if it be meant to communicate any papers which contain matters defamatory as they think proper, that is a matter which, in my judgment, can only be done by an act of the legislature. And I do not think that the communicating defamatory papers to the public can be justified as a matter of necessity, or as reasonable to be done.

An argument has been adduced in favour of the right to publish the proceedings in parliament from the act of 42 G. 3, c. 63, allowing the votes and proceedings in parliament to be sent free of postage. It may be thought very right to allow those papers to be sent free of postage on general principles: but no argument can be adduced from that, that the act meant to sanction the publication of such papers as are defamatory.

Then it is said, the plaintiff is defamed by these papers being delivered to the members, and therefore it is of little consequence whether the number of defamatory papers are extended. But thousands of copies may be distributed under the order of the house; and upon no principle of law can it be contended that, because a man may be lawfully criminated amongst one class of her majesty's subjects, that he may be so amongst all.

Then it is said that, though the defaming a man's character be an evil, yet it is an evil of small magnitude compared with the advantages that may result from the publication of defamatory papers. But it does not appear to me that, as a general proposition, benefit is to be

expected to result from the publication of defamatory papers. The advantages are altogether undefined and uncertain, and cannot as a matter of law, be set off against the positive injury arising to a man from his character being defamed. But, if such a principle of law could be admitted, it would be necessary to show what was the advantage to be derived from such a publication.

It is said that there is no instance of any action having ever been brought against any person for publishing parliamentary papers, the publication of which was sanctioned by the resolution of either House of Parliament, and that is a very strong reason why the action is not maintainable. That is sometimes given as a reason why an action cannot be maintained: but all such cases depend upon their own particular circumstances: when such cases arise, the principles of law are examined, and, if they apply, the courts decide an action to be maintainable, though none such has ever been brought before; but here, the action taken by itself is confessedly maintainable, and the question is about the justification. Now the same identical justification was never pleaded before that I know of: and the question therefore is, not whether the action itself is maintainable, but whether there can be any objection to it, because the defence has never been set up. If the defence has never been pleaded before, and never brought into discussion on any other occasion except as far as I have before mentioned, there is no more reason to say that it is good, or that it is bad, till it has been investigated.

But it is said, that the practice of publishing parliamentary papers never has been disputed, and that there has been a complete acquiescence in it amongst all classes of persons, and that there have been a great many occasions where discussions have arisen in which circumstances relating to individuals have been laid before parliament, and that copies of those proceedings have been distributed through the country; as, for instance, in the investigation of the South Sea scheme, the slave trade, the municipal corporation act, and many others; and yet nobody has ever come forward to institute any proceedings upon them. Against those who furnished any criminatory matter to be laid before the house, or against any one who published them for the use of the members, no proceeding can be instituted. But, as to those who distributed them to the public, it may be remarked that persons whose conduct and character might be impugned where abuses existed might feel that they deserved the imputation, and that the charges against them were true, and therefore their taking any proceedings would only be to make the matter worse: and, as to those who were unconscious of deserving the charges, they might think that it would not be advisable to enter into a contest with the House of Commons.

It is said to allow this to be decided is contrary to the Bill of Rights. The Bill of Rights, (1 W. & M. sess. 2, c. 2,) declares that the freedom of speech and debates on proceedings in parliament ought not to be impeached or questioned in any court or place out of parliament. This does not, in my opinion, in the smallest degree infringe upon the Bill of Rights. I think this is not such a proceeding in parliament as the Bill of Rights refers to; it is something out of parliament. The privileges of parliament appear to me to be confined to the walls of parliament, for what is necessary for the transaction of business there, to protect individual members so as that they may always be able to attend to their duties, and to punish persons who are guilty of contempts to the house, or

against the orders and proceedings or other matters relating to the house, or to individual members in discharge of their duties to the house, and to such other matters and things as are necessary to carry on their parliamentary functions; and to print documents for the use of the members. But a publication sent out to the world, though founded on and in pursuance of an order of the house, in my opinion, becomes separated from the house; it is no longer any matter of the house, but of the agents they employ to distribute the papers; those agents are not the house, but, in my opinion, they are individuals acting on their own responsibility as other publishers of papers.

I admit that, if my opinion be correct, the same question may be agitated in the inferior courts, such as the quarter sessions and county and borough courts; that, however, results from the law: if the law be so they have the right to inquire into it.

I therefore, upon the whole of this case, again point out what Lord ELLENBOROUGH very much relied upon in his judgment in *Burdett v. Abbot*, 14 East, 158, when he said that "it is made out that the power of the House of Commons to commit for contempt stands upon the ground of reason and necessity independent of any positive authorities on the subject: but it is also made out by the evidence of usage and practice, by legislative sanction and recognition, and by the judgments of the courts of law, in a long course of well-established precedents and authorities." But, in the case now before the court, I think that the power of the House of Commons to order the publication of papers containing defamatory matter does not stand upon the ground of reason and necessity, independent of any positive authorities on the subject. And I also think that it is not made out by the evidence of usage and practice, by legislative sanction and recognition in the courts of law in a long course of well established precedents and authorities.

Upon the whole of the case, I think there should be judgment for the plaintiff.

PATTESON, J.—This is an action for a libel contained in a reply of certain inspectors of prisons, appointed under the act 5 & 6 W. 4, c. 38, to a report of the Court of Aldermen in London, and published by the defendants. The plea states that an original report of the inspectors was laid before the House of Commons *under the provisions of that act*, that their reply to the Court of Aldermen was laid before the house, *pursuant to an order of the house*, and became *part of the proceedings of the house*, which, as a matter of fact, is admitted by the demurrer. The plea also sets out a resolution of the House of Commons of the 13th August, 1835, that the parliamentary *papers and reports* printed for the use of the house should be rendered accessible to the public by purchase at the lowest price at which they could be furnished; and that a sufficient number of extra copies should be printed for that purpose.

It also sets out the appointment of a committee on the subject, their resolution, and a further resolution and order of the house that the parliamentary papers and reports printed by order of the house should be sold to the public at certain specified rates; and that Messrs. Hansard (the defendants,) the printers of the house, be appointed to conduct the sale thereof. It also states orders of the house for *printing* the original report of the inspectors and their reply. The plea then alleges that the defendants *printed and published* the report and reply by authority of the house; and, in conclusion, it sets out a resolution of the house of the 31st

May, 1837, by which it was resolved, declared, and adjudged, that the power of *publishing such of its reports, votes, and proceedings as it shall deem necessary, or conducive to the public interests*, is an essential incident to the constitutional functions of parliament, more especially of the Commons' House of Parliament as the representative portion of it. The declaration in this case is entitled on the 30th May, 1837, the day before the last-mentioned resolution. This resolution must be treated as declaratory only of a supposed ancient power of the House of Commons to publish, and that for two reasons. First, because, if it be treated as creating a new power or privilege, it would plainly be an alteration of the existing law, and an enactment of a new law by one branch of the legislature only, which, it is admitted on all hands, cannot lawfully be done. Neither is the language of the resolution consistent with such a supposition; for, if the power or privilege be essential now, it must always have been so, since the constitutional functions of parliament have always been the same. Secondly, if it be treated as a new power or privilege, it is not applicable to the libel for the publication of which this action is brought, nor to the action itself, both of which are prior to the passing of the resolution. The resolution in its terms seems to imply the exercise of some discrimination in the house, in selecting portions of its proceedings for publication; for it is limited to *such* of its proceedings as it shall deem necessary or conducive to the public interests; one would, therefore, have expected to see some averment in the plea that the publication in question had been so deemed by the House of Commons; yet nothing of the kind is to be found. However, as the plea sets out a prior resolution of the house, that the parliamentary papers and reports printed by order of the house should be sold to the public, I suppose it must be taken, upon this record, that the House of Commons deems it necessary, or conducive to the public interests, to *publish all* the parliamentary papers and reports which it orders to be printed, without exercising any other discrimination, as to particular papers, than may be supposed to have been exercised when they were ordered to be *printed*. And the more so as there is an averment in the plea that the *publication* in question was by authority of the house, which is admitted by the demurrer.

Three questions appear to arise on this record.

First, whether an action at law will lie in any case for any act whatever admitted to have been done by the order and authority of the House of Commons.

Secondly, whether a resolution of the House of Commons, declaring that it had power to do the act complained of, precludes this court from inquiring into the legality of that act.

Thirdly, if such resolution does not preclude this court from inquiring, then whether the act complained of be legal or not.

With respect to the first question, it has not been contended in argument that either house of parliament can authorize any person to commit with impunity a known and undoubted breach of the law. Extravagant cases have been sometimes put, illustrating the impossibility of maintaining such a proposition. It has been answered truly, that it is not decent or respectful to those high assemblies to suppose that such extravagant cases should arise. But less extravagant cases have arisen in which both houses of parliament have confessedly exceeded their powers in punishing persons for trespasses on the lands of members, and other matters wholly without their jurisdiction, but which they have treated as

questions of privilege. And, though no instance has been cited of any action having been brought, but, on the contrary, the persons proceeded against have very commonly submitted to the illegal treatment they have met with, yet surely the maxim of law must apply, viz. that there is no wrong without a remedy; and where can the remedy be but by action in a court of law against those who have done the injury? If it be once conceded that either house of parliament can make an illegal order, it must necessarily follow that the party wronged may have redress against those who carry such illegal order into effect: and how can he have such redress but by action at law? Great difficulties may undoubtedly arise in distinguishing between acts done *in* the house, and *out* of the house under orders given *in* the house, and in determining against whom such action would lie. It is clear that *no action can be maintained* for any thing said or done by a member of either house in the house; and the individual members composing the House of Commons, whether it be a court of record or not, may, like other members of a court of record, be free from personal liability on account of the orders issued by them as such members. Yet, if the orders themselves be illegal, and not merely erroneous, upon no principle known to the laws of this country can those who carry them into effect justify under them. A servant cannot shelter himself under the illegal orders of his master. Nor could an officer under the illegal orders of a magistrate, until the legislature interposed and enabled him to do so. The mere circumstance, therefore, that the act complained of was done under the order and authority of the House of Commons cannot of itself excuse that act, if it be in its nature illegal: and it is necessary, in answer to an action for the commission of such illegal act, to show, not only the authority under which it was done, but the power and right of the House of Commons to give such authority. This point indeed was not pressed upon the argument of this case; but I have mentioned it because it seems to me that it will be very difficult to maintain the affirmative of the second question, if this first point be given up.

The second question is, as I conceive, raised upon this record by the declaratory resolution of the 31st of May, 1837, set out at the conclusion of the plea. The other resolutions and orders set out in the plea are not declaratory of the power or privilege of the house, but directory only: and, as it has been shown that it is possible that the house, however unintentionally, may make illegal orders, and that, if it should do so, those who carry them into effect may be proceeded against by action at law, it follows that the court in which such action is brought must, upon demurrer, inquire into the legality of those directory orders, and cannot be precluded from doing so by the mere fact of those orders having been made.

If this court, then, be not precluded from entertaining the question as to the legality of the directory orders by the orders themselves, it is precluded, if at all, by the resolution of the 31st of May, 1837, and by nothing else. No other resolution of the House of Commons to a similar effect is set out in the plea, and we cannot look out of the record. It is certainly somewhat strange to urge that this court in which the present action was already pending, and which had already on its proceeding the declaration of the plaintiff, should be precluded from entering into the question by a resolution of the House of Commons passed between the declaration and the plea; but I pass on to consider the effect of the reso-

lution as if it had been passed long before any action had been brought in which a question could arise as to the existence of the power to which it relates.

The proposition is certainly very startling, that any man, or body of men, however exalted, except the three branches of the legislature concurring, should by passing a resolution that they have the power to do an act illegal in itself, be able to bind all persons whatsoever, and preclude them from inquiring into the existence of that power and the legality of that act. Yet this resolution goes to that extent; for, unless it is taken to mean that the House of Commons has power to order the publication of that which it knows to be defamatory of the character of an individual, and to protect those who carry that order into effect from all consequences, it will not avail the defendants in this action. I take the resolution, therefore, to have that meaning, though the language of it does not necessarily so import. And I take it also, in combination with the resolutions in 1835, to mean that the House of Commons deems it necessary or conducive to the public interests that *all* the parliamentary papers which it orders to be printed should be sold, though the resolution of 1837 by itself would seem to imply directly the contrary, and that some discrimination as to publishing should be exercised on the subject. Now, if the House of Commons, by declaring that it has power to publish all the defamatory matter which it may have ordered to be printed in the course of its proceedings with impunity to its publisher, can prevent all inquiry into the existence of that power, I see not why it may not, by declaring itself to have any other power in any other matter, equally preclude all inquiry in courts of law or elsewhere, as to the existence of such power. And what is this but absolute arbitrary dominion over all persons, liable to no question or control? It is useless to say that the house cannot by any declaratory resolution give itself *new* powers and privileges; it certainly can, if it can preclude all persons from inquiring whether the powers and privileges, which it declares it possesses, exist or not: for then how is it to be ascertained whether those powers and privileges be new or not? If the doctrine be true that the house, or rather the members constituting the house, are the sole judges of the existence and extent of their powers and privileges, I cannot see what check or impediment exists to their assuming any new powers and privileges which they may think fit to declare. I am far from supposing that they will knowingly do so; but I see nothing to prevent it. Some mode of ascertaining whether the powers and privileges so declared be new or not must surely be found; and, if it be conceded that the courts of law, when that question of necessity arises before them, may make the inquiry, then the doctrine that the resolution of the 31st of May 1837 precludes inquiry by this court must fall to the ground. But it is argued that the point must be ascertained by reference to public opinion. I cannot find in the common law, or statute law, or in any books of authority whatever, any allusion to such reference: and indeed what tribunal can be conceived more uncertain, fluctuating, and unsatisfactory, than public opinion? It is even difficult to define what is meant by the words "public opinion."

It is further argued that the courts of law are inferior courts to the Court of Parliament and to the Court of the House of Commons, and cannot form any judgment as to the acts and resolutions of their superiors. I admit fully that the Court of Parliament is superior to the

courts of law; and in that sense they are inferior courts: But the House of Commons by itself is not the Court of Parliament. Further, I admit that the House of Commons, being one branch of the legislature, to which legislature belongs the making of laws, is superior in dignity to the courts of law, to whom it belongs to carry those laws into effect, and, in so doing, of necessity, to interpret and ascertain the meaning of those laws. It is superior also in this, that it is the grand inquest of the nation, and may inquire into all alleged abuses and misconduct in any quarter, of course in the courts of law, or any of the members of them; but it cannot, by itself, correct or punish, any such abuses or misconduct; it can but accuse or institute proceedings against the supposed delinquents in some court of law, or conjointly with the other branches of the legislature may remedy the mischief by a new law. With respect to the interpretation and declaration of what is the existing law, the House of Lords is doubtless a superior court to the courts of law. And those courts are bound by a decision of the House of Lords expressed judicially upon a writ of error or appeal, in a regular action at law or suit in equity; but I deny that a mere resolution of the House of Lords, or even a decision of that house in a suit originally brought there (if any such thing should occur, which it never will, though formerly attempted,) would be binding upon the courts of law, even if it were accompanied by a resolution that they had power to entertain original suits: much less can a resolution of the House of Commons, which is not a court of judicature for the decision of any question either of law or fact between litigant parties, except in regard to the election of its members, be binding upon the courts of law. And it should be observed that, in making this resolution, the House of Commons was not acting as a court either legislative, judicial, or inquisitorial, or of any other description. It seems to me, therefore, that the superiority of the House of Commons has really nothing to do with the question.

But it is further said that the courts of law have no knowledge or means of knowledge as to the *lex et consuetudo parliamenti*, and cannot therefore determine any question respecting it. And yet, at the same time, it is said that the *lex et consuetudo parliamenti* are part of the law of the land. And this court is, in this very case, actually called upon by the defendants to pronounce judgment in their favour, upon the very ground that their act is justified by that very *lex et consuetudo parliamenti*, of which the court is said to be invincibly ignorant, and to be bound to take the law from a resolution of one branch of the parliament alone. In other words, we are told that the judgment we are to pronounce is not to be the result of our own deliberate opinion on the matter before us, but that which is dictated to us by a resolution of the House of Commons, into the grounds and validity of which resolution we have no means of inquiring, and are indeed forbidden by parliamentary law to inquire at all. I cannot agree to that position. If I am to pronounce a judgment at all, in this or in any other case, it must and shall be the judgment of *my own mind*, applying the law of the land as I understand it according to the best of my abilities, and with regard to the oath which I have taken to administer justice truly and impartially.

But, after all, there is nothing so mysterious in the law and custom of parliament, so far at least as the rest of the community not within its walls is concerned, that this court may not acquire a knowledge of it in

the same manner as of any other branch of the law. In the margin of the well known passage in Lord Coke's Fourth Institute, (4 Inst. 15, in marg; also in Co. Litt. 11 b.) it is said to be *lex ab omnibus querenda a multis ignorata, a paucis cognita*. The same might with the same truth be said of any other part of the law. Lord Coke says, in the same place, that the High Court of Parliament *suis propriis legibus et consuetudinibus subsistit*. This is perfectly correct also when applied to the internal regulations and proceedings of parliament, or of either house; but it does not follow that it so when applied to any power it may claim to exercise over the rest of the community.

It is, indeed, quite true that the members of each house of parliament are the sole judges whether their privileges have been violated, and whether thereby any person has been guilty of a contempt of their authority; and so they must necessarily adjudicate on the extent of their privileges. All the cases respecting commitments by the house, mostly raised upon writs of habeas corpus, and collected in the arguments and judgments in *Burdett v. Abbot*, 14 East, 1, establish, at the most, only these points, that the House of Commons has power to commit for contempt; and that, when it has so committed any person, the court cannot question the propriety of such commitment, or inquire whether the person committed had been guilty of a contempt of the house; in the same manner as this court cannot entertain any such questions, if the commitment be by any other court having power to commit for contempt. In such instances, there is an adjudication of a court of competent authority in the particular case; and the court which is desired to interfere, not being a court of error or of appeal, cannot entertain the question whether the authority has been properly exercised. In order to make cases of commitment bear upon the present, some such case should be shown in which the power of the House of Commons to commit for contempt under any circumstances was denied, and in which this court had refused to enter into the question of the existence of that power. But no such case can be found, because it has always been held that the house had such power, and the point attempted to be raised in the cases of commitment has been as to the due exercise of such power. The other cases which have been cited in argument relate generally to the privileges of individual members, not to the power of the house itself, acting as a body; and hence, as I conceive, has arisen the distinction between a question of privilege coming directly or incidentally before a court of law. It may be difficult to apply the distinction. Yet it is obvious that, upon an application for a writ of habeas corpus by a person committed by the house, the question of the power of the house to commit, or of the due exercise of that power, is the original and primary matter propounded to the court, and arises directly. Now, as soon as it appears that the house has committed the person for a cause within their jurisdiction, as for instance, for a contempt so adjudged to be by them, the matter has passed in rem judicatam, and the court before which the party is brought by writ of habeas corpus must remand him. But if an action be brought in this court for a matter over which the court has general jurisdiction, as, for instance, for a libel, or for an assault and imprisonment, and the plea first declares that the authority of the House of Commons or its powers are in any way connected with the case, the question may be said to arise incidentally; the court must give some judgment, must somehow dispose of the question. I do not, however, lay any great stress on

this distinction. It seems to me that, if the question arises in the progress of a cause, the court must of necessity adjudicate upon it, whether it can be said in strict propriety of language to arise directly or incidentally.

I do not purpose to go through all the authorities upon this part of the subject which have been already examined by my lord, but to confine myself to a few of the leading cases; before, however, I do so, I would observe that privilege and power appear to me to be very different things, as I shall have occasion to observe hereafter, and that the present question appears to me to relate to the *powers* of the House of Commons and not to its *privileges* properly so called.

The principal case is *Thorp's case*. (31 & 32 H. 6; 1 Hats. Pr. 28, from 5 Rot. Parl. 239; S. C. 13 Rep. 63.) I cannot pretend, after all the observations which have been made upon that case by counsel and judges, and by the report of the committee of the House of Commons on which the resolution of May 31st, 1837, was founded, and to which we have been referred by the attorney-general, to throw any new light upon the real grounds of the answer there first delivered by the judges. With all deference for ancient authority, it appears to me to have been an evasive answer, probably arising from the circumstances of the times: but if that be not so, the answer, being given in the House of Lords, has respect to the situation both of those who proposed the question and those who gave the answer, and amounts only to this, that they the judges ought not to be called upon by the lords in parliament to inform them as to the privileges of parliament, which they must themselves know; but it is nothing like a disclaimer of being able to decide any such question if it should arise in their own courts. And, as to that part of their answer in which they speak of parliament being able to make that law which was not law, it is plainly beside the question proposed; for it must relate to the power of the three branches of the legislature concurring, and not to any resolutions of any one of them separately, or even of any two of them; added to which, they do actually give their opinion as to what they would hold in their own courts, and the lords adopt and act upon it. (See p.117, ante, note a.)

The passages in Lord Coke's Fourth Institute (4 Inst. 15; see also 4 Inst. 49, 50,) rest upon *Thorp's case*, 1 Hats. Pr. 28, and if the foundation fails, the superstructure cannot stand, however celebrated the architect may be.

Expressions are certainly to be found in *Rex v. Wright*, 8 T. R. 293, which appear to withdraw from the courts of law all power of noticing the publication of parliamentary papers; but the expressions used by Lord KENYON appear to me, I say it with hesitation, and pace tanti viri, to be quite inconsistent; and I am at a loss to know on what ground he really proceeded: whilst Mr. Justice LAWRENCE appears to have considered that the matter was not libellous, let it be published by whom it would; and it is to be observed that it did not appear that it was published by order of the House of Commons. Again, the authority of that case is greatly shaken by *Rex v. Creevey*, 1 M. & S. 273; and, even if that was not so, it is to be recollected that the motion there was for a criminal information, which is a matter of discretion and not of right, and moreover that the doctrine as to the legality of publishing proceedings of courts of justice was then recently held without those qualifications and restrictions which as I think, common sense, and the obvious

good of the community at large, have compelled the judges since that time to engraft upon it.

On the other hand, the cases of *Donne v. Walsh*, 1 Hats. Pr. 41, *Ryver v. Cosyn*, 1 Hats. Pr. 42, and *Benyon v. Evelyn*, O. Brigman's Judgments, 324, show that the courts of law have taken cognisance of such questions, and have decided contrary to the known claims of the house for its members: and whether it be true or not that Sir Orlando Bridgman made a gratuitous and unnecessary display in the latter case, this is certain that his learned and laboured judgment must have excited, and did excite, great attention, and yet the decision was acquiesced in. It is true that we have no evidence of the direct interference of the house in that case: neither could they constitutionally interfere as a body, inasmuch as no act of theirs, as a body, was brought into question; but no one doubts that the claim of the member was in reality the claim of the house. To that case may be added *Fitzharris's case*, 8 How. St. Tr. 223, and that of *The Duchess of Somerset v. The Earl of Manchester*, Prynne's Reg. Part 4, 1214, and the memorable cases of *Ashby v. White*, 2 Ld. Ray. 938, and *Regina v. Paty*, 2 Ld. Ray. 1105, and *Knolly's case*, 12 How. St. Tr. 1167. I do not mention these last cases as showing that the jurisdiction of the courts of law, in matters said to concern the privileges of parliament, has been conceded by the House of Commons, but as showing that it has not been decided that such jurisdiction in no case exists; and in *Ashby v. White*, 2 Ld. Ray. 938, there was strong ground for maintaining that the House of Commons had exclusive jurisdiction over the subject as a court of judicature, though I think not sufficient ground; whereas, on the present question there is no possible ground for so saying. I agree that the case of *Rex v. Williams*, 13 How. St. Tr. 1369, is not to be relied on. The political character of it, the violence of the times, and the just dread of arbitrary power in the crown, which occasioned the allusion to it in the Bill of Rights, deprive it of authority as a solemn judgment of the court. Yet it is plain that the speaker of the House of Commons could not be justified, even under the law of privilege as declared by the resolution of the 31st of May, 1837, in publishing Dangerfield's Narrative, which was no part of the proceedings of the house: and the bare authority of the house could alone be set up as his justification, which I have already shown to be insufficient for that purpose. Another ground may be taken to show that *Rex v. Williams*, 13 How. St. Tr. 1369, was not a right decision, that the thing done by him, viz. the order to publish, may be said to have been done *in the house*, and so not to be *cognizable by the courts* of law. Yet the man himself, for whose benefit the publication took place, Dangerfield, was committed and punished for publishing the very same thing out of the house. That which was reprobated in *Williams's case*, 13 How. St. Tr. 1369, was the prosecution, by the officer of the crown, of the speaker of the house for an act done by him as such speaker. The legality of such an act, as regarded private individuals, was in no way brought under review. And the Bill of Rights (stat. 1 W. & M. sess. 2, c. 2, s. 1.) plainly points at prosecutions for proceedings in parliament only.

I do not particularly advert to the other cases cited from Hatsell and other books; for they really do not appear to me to bear materially upon this part of the case, or indeed upon any of the questions raised upon this record. The supposed mischief of an appeal to the House of Lords cannot surely prevent this court from adjudicating on the question. Indeed

the attorney-general asks us to pronounce judgment for the defendants, because the House of Commons have resolved that we are bound to do so; yet upon that judgment a writ of error will lie just as much as if we give judgment for the plaintiff. To avoid such inconvenience, if it be important to do so, some legal mode should have been found of making it unnecessary for us to give any judgment at all: but no such mode can be found. The analogy attempted to be established, upon the argument, from decisions of courts of exclusive jurisdiction, appears to me not to hold good. The instances adduced are in respect of matters admitted to be within the exclusive jurisdiction of such courts, whether ecclesiastical or courts of admiralty, or foreign courts, and in which they have in the particular case come to a decision, and so the matter has passed in *rem judicatam*; but none have been or can be cited where a decision of any of those courts, that a particular matter is within its exclusive jurisdiction, has been allowed to be binding upon other courts as to that position, and to oust them of their right of jurisdiction: it may be that in some cases there is concurrent jurisdiction: and, as I have before observed, the resolution of May, 1837, cannot be considered to have been passed by the House of Commons *as a court* either legislative, judicial, or inquisitorial, or of any other description. Cases were cited by the attorney-general, where the Court of Exchequer had taken from the other courts of law proceedings pending before them; but they were cases of revenue belonging by the king's prerogative peculiarly to that court, and in which that court had confessedly exclusive jurisdiction.

Some cases were also cited where the House of Lords had compelled parties to relinquish proceedings in the courts of law in respect of matters occurring *in* that house, as to which it is conceded that the courts of law cannot have cognizance.

It is further argued that, if this court can entertain this question, so can the most inferior Court of Record in the kingdom, where the matter arises within its jurisdiction. I admit it to be so; but I can see no reason why the mere resolution of the house should preclude an inferior court from the inquiry, any more than this court: nor can I see anything derogatory to the dignity of the house in such inquiry.

Upon the whole the true doctrine appears to me to be this: that every court in which an action is brought upon a subject-matter generally and *prima facie* within its jurisdiction, and in which, by the course of the proceedings in that action, the powers and privileges and jurisdiction of another court come into question, must of necessity determine as to the extent of those powers, privileges, and jurisdiction: that the decisions of that court, whose powers, privileges and jurisdiction are so brought into question, as to their extent, are authorities, and, if I may so say, evidences in law upon the subject, but not conclusive. In the present case, therefore, both upon principle and authority, I conceive that this court is not precluded by the resolution of the House of Commons of May, 1837, from inquiring into the legality of the act complained of, although we are bound to treat that resolution with all possible respect, and not by any means to come to a decision contrary to that resolution unless we find ourselves compelled to do so by the law of the land, gathered from the principles of the common law, so far as they are applicable to the case, and from the authority of decided cases, and the judgments of our predecessors, if any be found which bear upon the question.

I come then to the third question: Whether the act complained of be

legal or not. I do not conceal from myself that, in considering this point, the resolution of the House of Commons of 31st May, 1837, is directly called in question; but, for the reasons I have already given, I am of opinion that this court is, not only competent, but bound, to consider the validity of that resolution, paying all possible respect, and giving all due weight, to the authority from which it emanates.

The privilege, or rather power (for that is the word used,) which that resolution declares to be an essential incident to the constitutional functions of parliament, is attempted to be supported, first, by showing that it has been long exercised and acquiesced in; secondly, that it is absolutely necessary to the legislative and inquisitorial functions of the house.

First, as to exercise and acquiescence. I am far from saying that, in order to support any privilege or practice of parliament, or of either house, it is necessary to show that such privilege or practice has existed from time of legal memory. That point was disposed of by Lord ELLENBOROUGH, in the course of the argument in *Burdett v. Abbot*, 14 East, 1. (a) Long usage, commencing since the two houses sat separately (if indeed they ever sat together, as to which I do not stop to inquire, nor *when* they separated, as being wholly immaterial to this question,) may be abundantly sufficient to establish the legality of such privilege or practice.

Now, with respect to the exercise of the power in question, I conceive that such exercise is matter of history, and therefore that the observation of Mr. Attorney-General, that he ought not to be called upon in arguing a demurrer to prove matter of *fact*, is not well founded. If, indeed, the plea had stated that the Commons' House of Parliament had been used to exercise this power, the demurrer would have admitted the exercise, but no such averment appears upon the face of the plea; and the historical fact of the exercise of the power is introduced by the defendants' counsel himself, in order to argue thence that the power must be legal. The onus of showing that it is so lies upon the defendants; for it is certainly *prima facie* contrary to the common law. It is very remarkable that no mention is made of this alleged power of the House of Commons in any book of authority, or by any text writer. It is no where enumerated among the privileges or powers of the house. After the utmost research by the learned counsel who so ably argued this case, he has not furnished us with a single passage from any author, nor have I found any, in which even a hint is thrown out that the House of Commons has power to order defamatory matter appearing upon its proceedings to be published, and to protect the publisher from the consequences which generally attach upon the publication of such matter. Surely if such a power had really existed, some notice of it would have been taken by Hatsell or Blackstone, or some other writer, in commenting upon parliamentary privilege: and the absence of all such notice, is to me a strong circumstance to show that it really never existed. The first instance of the house *printing* anything appears to have been in the year 1641. It is indeed argued by Mr. Attorney-General that, although the votes and proceedings of the house do not appear to have been *printed* and published before that time, yet that doubtless some other mode of publication, either at the sheriffs' courts or some other occasions of public meeting, must have been adopted. As to which argument, I must say that it appears to me to be a purely gratuitous assertion without the semblance of probability.

(a) See the judgment of Lord Ellenborough, p. 139

Acts of parliament, that is, new laws, appear to have been so promulgated; but there is not a trace to be found, that I am aware of, of the votes and proceedings of either house separately having been so dealt with.

The exercise of this power cannot therefore be said to have commenced earlier than 1641, a most suspicious time in the history of this country for the acquisition of a new power by the House of Commons. From 1641 to 1680 it appears that specific votes and proceedings only were printed from time to time by special resolutions. The papers first printed appear to relate entirely to the contest between the king and the house, and were, no doubt, intended for general circulation; but surely it is impossible to contend that a practice arising out of the unfortunate and violent state of the times can be supported, unless other reasons applicable to quiet and ordinary times can be assigned for its continuance. In 1680 the first general order for printing the votes and proceedings of the house is made, and, with the exception of a short time during the year 1702, (a) has been continued to the present time. The votes and proceedings so printed appear also to have been sold during that time, whether as a perquisite of the officers or not is perhaps not very material; and no question has arisen respecting the legality of the practice. The votes and proceedings so printed appear to have been recognised by the House of Lords as authentic documents; upon which however I do not see that much stress can be laid, inasmuch as the fact of their being printed under the order of the House of Commons must of necessity authenticate them, whether it were legal so to print them or not. These votes and proceedings are quite distinct from reports and miscellaneous papers printed for the house, and do not seem to have contained at any time matters defamatory to private individuals: and therefore the absence of any attempt to question their legality can hardly be treated as any acquiescence. No one was aggrieved.

With respect to reports and miscellaneous papers printed for the use of the house, it appears that no general order for their publication and sale was made until the resolution of 1835, set out in the plea in this action. Many resolutions were passed from time to time as to the printing and publishing specific papers; and many of those papers were of such a nature that private individuals may have felt themselves aggrieved, and may have found in them matters defamatory to themselves, for which actions at law might plainly have been maintained, if published under ordinary circumstances unconnected with the house; and it is, as I apprehend, upon the absence of any trace of such actions with respect to such papers that the argument with regard to acquiescence mainly rests. The argument is undoubtedly entitled to consideration: it has been frequently used in other cases, and much weight has been given to it by great authorities, particularly by Mr. Justice BULLER in the case of *Le Caux v. Eden*, 2 Doug. 594; see p. 602: but it is obvious that the weight of it much depends upon the nature of the injury sustained, the relative power of the person inflicting it, and the person sustaining it, and the greater or less difficulties with which the remedy is surrounded. If these points be attended to, it is hardly possible to imagine a case less likely to be brought forward than that of a man who found that he was defamed in a paper published by the order of the House of Commons as

(a) See Report from the Select Committee, &c., p. 2, s. 12.

part of their proceedings: not to mention that in very many instances, especially if due discrimination was exercised, as I cannot help thinking was formerly the case, the defamatory matter was strictly true, and therefore an action would be useless, and criminal proceedings equally so, as regarded any remuneration to the party complaining. The fear of contending with so powerful a body must operate very strongly in deterring persons from bringing actions, and may well account for the attempt never having been made. In the case of *Lake v. King*, 1 Saund. 131, indeed, the attempt was made to render a petitioner to the House of Commons liable in damages to a person who was defamed in his petition which he had printed for circulation amongst the members of the house. The action was held not to lie, the distribution of the publication having been confined to the members of the house. The exercise of the power by the house, until 1835, appears to have been by special order, directing sometimes that papers be printed for the use of the house, sometimes that they be printed (generally), sometimes that they be also published; and they appear to have been sold by officers of the house as a perquisite, until in 1835 the resolution set out in the plea was come to, that they should be sold by the defendants to the public in general, the object being, so far as it can be collected from the resolution, to defray the expenses of printing that which was requisite for the use of the members, not to give any important or necessary information to the constituents of the different members of the house.

It is said that the House of Lords has constantly ordered the printing and publishing of papers and proceedings, and that no instance occurs of any action having been brought against the publisher. The same observations apply to such practice in that house as have already been urged with respect to the House of Commons, except as relating to *trials* in the House of Lords. They are proceedings in an open court of justice, and may properly be considered under the second ground on which this power is supposed to exist, namely, the necessity for it.

Beyond all dispute it is necessary that the proceedings of each House of Parliament should be entirely free and unshackled; that *whatever is done or said in either house should not be liable to examination elsewhere*; therefore no order of either house can itself be treated as a libel, as the attorney-general supposed it might if this action would lie. No such consequence will follow.

The power claimed is said to be necessary to the due performance both of the legislative and inquisitorial functions of the house. In all the cases and authorities, from the earliest times hitherto, the powers which have been claimed by the House of Commons for itself and its members, in relation to the rest of the community, have been either some privilege properly so called, *i. e.*, an exemption from some duty, burden, attendance, or liability to which others are subject, or the power of sending for and examining all persons and things, and the punishing all contempts committed against their authority. Both of these powers proceed on the same ground, *viz.* the necessity that the House of Commons and its members thereof should in no way be obstructed in the performance of their high and important duties, and that, if the house be so obstructed, either collectively, or in the persons of the individual members, the remedy should be in its own hands, and immediate, without the delay of resorting to the ordinary tribunals of the country. Hence liberty of speech within the walls of the house freedom from arrest, and from

some other restraints and duties during the sitting of parliament, and for a reasonable time before and after its sitting (with the exception of treason, felony, and breach of the peace,) which, although the privileges, properly so styled, of the individual members, are yet the privileges of the house. Hence the power of committing for contempt those who obstruct their proceedings, either directly, by attacks upon the body or any of its members, or indirectly, by vilifying or otherwise opposing its lawful authority. Cases have frequently arisen, in which the extent and exercise of these privileges and powers have come in question: and I believe that all such cases will be found to range themselves under one of the two heads I have mentioned. But this is, I believe, the first time in which a question has arisen as to the power of the house to authorise an act prejudicial to an individual who has neither directly or indirectly obstructed the proceedings of the house, and is in no way amenable to its authority. The decision of *Lake v. King*, 1 Saund. 131, which I mentioned before, proceeded on similar grounds of necessity.

Every facility ought undoubtedly to be given to all persons applying to either House of Parliament or to any court of justice for the redress of any alleged grievance; and it would be most inconvenient to hold such persons liable to actions for anything contained in such applications, as libel; but, when those who are applied to circulate generally by sale such defamatory matters, the case assumes a very different character. In the case of *Fairman v. Ives*, 5 B. & Ald. 642, (7 Eng. Com. Law Reps. 220,) a petition addressed by the creditor of an officer in the army to Lord Palmerston the secretary at war was held not to be actionable, although containing defamatory matter; but can it be doubted that if Lord Palmerston had ordered it to be published, the publisher would have been liable to an action; or can it be contended that the secretary of state, to whom the report and reply on which this action is brought were, by act of parliament, directed to be sent, to be by him laid before the parliament, would have been justified in publishing them? and, if not, why should the House of Commons be at liberty to do so? In the same manner the protection of all confidential communications extends no further than the necessity of each particular case requires.

It is said that, if papers, however defamatory, must needs be printed for the use of the members, as it is plain they must, and the point is not disputed, their further circulation cannot be avoided, for what is to be done with the copies upon a dissolution of parliament, or upon the death or retirement of a member? The answer is obvious,—the copy of such defamatory matter ought to be destroyed, as it can no longer be used for the purpose for which it was intended;—at all events it must not be communicated to others. But it is said that the constituents have a right to watch over the conduct of their representatives, and therefore to know what passes in the house. The house itself is of a different opinion; for it is only by sufferance that any one is allowed to be present at its debates; it is only by sufferance that the debates are allowed to be published; and it is only by the special permission of the house that its votes, and proceedings, and papers are communicated to the public, and that in the manner in which they think fit to order. If the constituents had a right to know all that passes, or if the House of Commons were an open court, then indeed there might be some colour for saying that it was necessary to publish all its proceedings. It is upon the ground that courts of justice are open to the public, that what passes there is public at the

time, and that it is important that all persons should be able to scrutinize what is there done, that the publication of every thing which there passes has been thought to be lawful. I for one do not go that length, but think, with some judges of great name who have gone before me, that the doctrine is to be taken with much limitation; but I feel sure that it cannot apply to a court which is not open, whose proceedings in contemplation of law are secret at the time they take place, and to whom *ex parte* statements, often grossly defamatory, are made without the defamed person having any opportunity of being heard, and indeed often without the possibility of any inquiry being instituted; and it is not impossible, if such indiscriminate publication and sale be continued by the House of Commons, that petitions containing the grossest libels against the most innocent individuals may be purposely and maliciously presented to that honourable house, by persons who seek to publish and sell them with impunity, and to make the house most unconsciously the instrument of circulating their slander. It is the nature of the proceedings themselves which justifies, if at all, the publication of what passes in a court of justice; and *any person* may therefore publish them: but the proceedings of the House of Commons cannot be published without the authority of the house; the right to publish does not result from the nature of the thing published, but from the leave obtained from the house; and this alone shows that it cannot be matter of necessity for the information of the constituents. I do not say that it may not be conducive to the public interests to inform the world at large of much that passes in the house; but I do say that it cannot be conducive to the public interests to circulate private slander; and that, in the exercise of a due discrimination as to what part of its proceedings shall be published, the House of Commons is bound to take care that such private slander be not circulated by its authority.

But it is said to be necessary in order to obtain the requisite information for the members in any legislative or inquisitorial measure. This ground is still less tenable: the house is armed with ample powers to send for all persons who can give them information either before a committee, or at the bar of the house. It can never be necessary to sell indiscriminately to every body, in order to take the chance of some person volunteering information to the house. Will it be said that any one ever did volunteer information in consequence of such publications by the house, or that the house ever waited and paused in its deliberations or its votes, in order to see whether any one would so volunteer? It is not pretended that such has been the fact. Whether any individual member might or might not be justified in communicating to some persons out of the house defamatory matter printed for the use of the house, I cannot pretend to say. Probably, upon any such question arising, the decision will lie with a jury; but I would by no means bind myself to any opinion on that subject: this is the case of an open sale to all who choose to buy, not justified by any peculiar circumstances attending this case above others.

Where, then, is the necessity for this power? Privileges, that is, immunities and safeguards, are necessary for the protection of the House of Commons, in the exercise of its high functions. All the subjects of this realm have derived, are deriving, and I trust and believe, will continue to derive, the greatest benefits from the exercise of those functions. All persons ought to be very tender in preserving to the house all privi-

leges which may be necessary for their exercise, and to place the most implicit confidence in their representatives as to the due exercise of those privileges. But *power*, and especially the power of invading the rights of others, is a very different thing: it is to be regarded, not with tenderness, but with jealousy; and, unless the legality of it be most clearly established, those who act under it must be answerable for the consequences. The onus of showing the existence and legality of the power now claimed lies upon the defendants: it appears to me, after a full and anxious consideration of the reasons and authorities adduced by the attorney-general in his learned argument, and after much reflection upon the subject, that they have entirely failed to do so: and I am therefore of opinion that the plaintiff is entitled to our judgment in his favour.

COLERIDGE, J.—I concur with the rest of the court in thinking that this plea discloses no sufficient answer to the declaration; and, if my brother PATTESON, after the full and satisfactory discussion which the question had *then* received, felt reluctant to state his reasons at length, it may well be seen how much more ground there is *now* for me to desire that I might be allowed simply to express my concurrence. But the unusual importance of the principles involved in the decision, and the profound respect due to those whose privileges are said to be at stake in the cause, seem to require that I also should state the reasoning by which I have arrived at this conclusion; and I have the consolation at least to feel certain that I *cannot* weaken the just effect upon this audience of what has already been stated. I shall not, however, think it necessary to notice all the points which have been made, or to comment on more than a few of the authorities cited in the argument. It would, indeed, be impossible to do this within any now reasonable bounds; and, in my opinion, the questions on which the cause must turn are so elementary, whatever difficulty there may be in them, that they must after all, be decided chiefly upon principle.

Two great questions have been discussed upon the argument; and I shall consider the plea as sufficiently raising them in substance, although I cannot say that they are raised so simply and unambiguously as I should have expected, as well from the great learning, and ability, and industry employed in framing it, as from the dignity of that high body on behalf of which we are informed that it has been pleaded. The first, and immeasurably the more important, of these is, whether it be competent to the court, after the disclosure by the plea that the House of Commons has declared itself to have the power of publishing any report, vote, or proceeding, the publication whereof it deems necessary or conducive to the public interests, to inquire whether by law the house has such power. Although not in form a plea to the jurisdiction, and wanting one essential incident to such a plea, if we answer this question in the affirmative, it would in effect lead to much the same consequences. We should not indeed dismiss the plaintiff from our court to another tribunal competent to give him relief, for none such is alleged to exist; but we should give judgment against him ministerially rather than judicially, on the ground that the act complained of was done in the exercise of a power, as to which the whole jurisdiction, both to declare its existence and to decide on the propriety of its exercise in the individual case, was beyond our competence, and exclusively in the body by whom the very act was done. According to this argument, the plea in form leaves a matter for

our decision, but in substance prescribes conclusively the judgment to be pronounced. It must be admitted that this is a very startling conclusion: and certainly it must not be confounded with cases to which it has been likened, where the question in a cause turning upon foreign law or any of those branches of our own law administered in courts of peculiar jurisdiction, we decide it, not according to the common law, but according to what we suppose would have been the decision in the foreign or the peculiar court. We are undoubtedly bound so to do; in one sense we have no discretion to do otherwise; that is, we cannot be influenced by any consideration, whether that decision would be satisfactory to our own minds as *English* or common lawyers; but still we exercise a judicial discretion, the same in kind, as in deciding on a question of the common or statute law; for we inquire, by such lights as we can procure, what that law, foreign or peculiar, may be; and, when we have ascertained it, we apply the facts to it, and decide accordingly. Neither, again, is this to be confounded with cases in which, after an adjudication by a foreign or peculiar court upon the same facts between the same parties, one shall bring the other before us in the way of original suit; there, indeed, and upon a distinct principle, if the fact of such adjudication be properly pleaded and proved, or admitted, the further agitation of the question will not be permitted: we do not profess to decide upon the merits of the case: the existence of the former judgment in full force is, by our own law itself, a legal bar to the second recovery, or a new agitation of the matter. We are now, however, called upon to abstain from all inquiry, in a case in which the existence of the law is not substantively alleged in the plea (for as the house, it is admitted, cannot make the law, the resolution declaring it is only *evidence* of its existence, and not an *allegation* of it,) where it does not appear that the particular facts have ever been adjudicated on, and where the particular order, under which the act complained of was done, is not distinctly brought within the law as said to have been declared.

All this, however, has been maintained upon the footing of privilege. It is said the Commons have declared that they have this privilege, and the act has been done in the exercise of the privilege, but a court of law can neither inquire whether they have the privilege, nor whether the case falls within it, because the House of Commons alone is to judge of its own privileges: the court, therefore, to use the words of the attorney-general, has "nothing to do but to give judgment for the defendants."

Now it will be observed that one and the same reason in terms is here assigned for two widely differing conclusions; and it may therefore well be that the proposition may have two different senses, and be true in one though false in the other. No one in the least degree acquainted with the constitution of the country will doubt that in one sense the house is alone to judge of its own privileges, that in the case of a recognised privilege the house alone can judge whether it has been infringed, and how the breach is to be punished. This concession, however, will not satisfy the advocates of privilege, nor the exigencies of the defendant's case. The attorney-general contends that the house is alone and exclusively judge of its own privileges, in the sense that it alone is competent to declare their number and extent, and that whatever the house shall resolve to be a privilege is by such resolution conclusively demonstrated to have been so immemorially.

This proposition must be tried by the tests of principle and authority. And, first, it is not immaterial to observe that privileges, though various in their kinds and effects are all understood to be comprehended within the proposition; and I at once admit that no distinction can be made; for all privileges must be ultimately referred to the same source, the effective discharge of those duties which by the constitution are cast upon the House of Commons. At the same time it is obvious that, in effect and in feeling, those privileges which become personal immunities to individual members, and those which are public and can be exercised only by the whole body in discharge of some public duty, are very different; and, when we are considering on principle the reasonableness of the proposition contended for, it must not be laid out of sight that the same rule is to be extended to that which the pride, the passions, and the self-interest of members may naturally be tempted to extend, and to that which the whole body, for the efficient discharge of its great public duties, may have thought it requisite to demand of the constitution. That this is not an idle apprehension the cases cited from the journals by the plaintiffs' counsel abundantly demonstrate.

I next observe that the power to make any new privilege has been as was necessary, distinctly disclaimed; the house, it is said, only acts judicially in declaring the law of parliament. We must however look to the substance of things: and, as that cannot be done indirectly which it is unlawful to do directly, if it shall appear that the power claimed is in effect equivalent to that which is disclaimed, a strong presumption at least is raised against the validity of the claim. Now what, in effect, is the right to declare the extent of privilege conclusively but irresponsible and uncontrollable power to make it? At present we know, or we fancy we know, the limits of privilege, in certain cases at least; for example, we have been taught that the House of Commons cannot administer an oath to a witness: let me suppose the house to resolve to-morrow that it has the power to do so, and that it is a breach of privilege to deny it; if the attorney-general's argument be correct, that power not merely is thenceforth, but from time immemorial has been, inherent in the house; and every judge and lawyer must forget all that he has been learned before, and is forbidden to inquire even into the previous acts or declarations of the same branch of the legislature upon the same subject; although the journals of the house might teem with conclusive proof that no such power existed, it would not be lawful for this court to borrow light from them; it must acquiesce in the new declaration, and deny its relief to any one suffering under it. Yet what would be in effect the result, but that the house would have thus acquired for itself a power which no lawyer could doubt it did not possess before? I have put a case drawn from within the range of those which fall under the admitted province of privilege; but the same reasoning will apply to cases entirely unconnected with it, cases which have really nothing to do with the duties or proceedings of the house. It would be easy to put striking instances of this kind; but they may be summed up at once, and without the least exaggeration, in the remark, that there is nothing dear to us, our property, liberty, lives or characters, which, if this proposition be true, is not, *by the constitution* of the country, placed at the mercy of the resolutions of a single branch of the legislature.

Three answers, however, are made to such a supposition; first, it is said that paramount and irresponsible power must be lodged somewhere,

and that it can nowhere be so safely lodged as with the representatives of the people; secondly, that it is not seemly to presume nor sound to argue from presumed abuses of power by so august a body; thirdly, that in truth what has been urged by way of objection with regard to the House of Commons might equally be said in the matter of contempts of this or any other court of judicature.

As to the first, I would observe that, by the theory of the advocates for privilege, *they* cannot argue this as a question of power; they limit themselves in terms to jurisdiction; they claim only an absolute jurisdiction; I answer that is in effect *uncontrollable* power; if they reply by an admission and a justification of that which I object, they must at least abandon their disclaimer of it, and acknowledge that they do in effect contend for the right not merely to declare, but to make privileges. But, if they justify the claim by asserting that absolute and irresponsible power must be lodged somewhere, and that it can nowhere be so safely lodged as with the representatives of the people, I take leave respectfully to dissent from both branches of the proposition.

As to the first, I will not waste time by examining those extreme cases with regard even to the entire legislature, in which, according to the theory of the constitution, even its so called omnipotence is limited; cases wisely not specified, nor in terms provided for, because they are beyond the constitution, and, when they unhappily arise, resolve society in its original elements. But, if the assertion be applied to any body in the state, or any court for the administration of justice, civil or criminal, there is neither the one nor the other which by the constitution claims absolute power in the sense in which it is now claimed for the Commons. Every question which comes before a court of justice must be one of law or fact; and, as to either, the decision may be wrong through error or corruption; but our constitution has been careful, almost to an extreme, in providing the means of correcting it in both cases, and for punishing it in judge or jury, when it can be traced to corruption. It is true that, as to errors in law, there must be some limit to the series of courts of revision; and it is supposable that the court of last resort may persist in the error of the original decision. But even in that extreme case the constitution fails not, for the parliament may then interfere (and has done so in some cases) to reverse and annul the erroneous decision.

Denying as I do the first branch of the proposition, it is not necessary for me, and would not comport with the profound respect which I feel for the House of Commons, to give my reasons for doubting the second.

But it is said, secondly, that the argument is founded on presumed abuse of power by the House of Commons; that such an argument is not sound in reasoning, nor seemly as applied to so august a body. I agree that it is not seemly, and I disclaim the intention of using it; yet, when I am considering merely the antecedent reasonableness of the defendant's argument, I cannot pretend to forget what the journals of the house have been shown to contain, nor to be ignorant that it is of the very nature of irresponsible power, especially in the hands of a large body, to run to excess. I believe, however, that among those who now claim this power are the men who would be the very last to abuse it. But the truth is, that the answer is beside the question: for the cases are put merely to try the truth of a universal proposition; and by the strict-

est rules of reasoning you may apply even extreme cases to test the truth of such propositions. My opponent in argument asserts that in all cases the house may declare conclusively that it possesses this or that privilege; I deny the truth of that, because, if true, the house would be able to commit *by law* this or that monstrous act of tyranny or injustice, he may in return either deny my assertion, or admit it; if he deny i, he will soon find that he must abandon his first claim also; if he admit it, then my argument is, that, whether in fact the consequence will happen seldom or often, or it may be never, that cannot be law from which such a consequence *may* in natural course follow.

To the third answer, I have already given the necessary reply in considering the first. I will only, in addition, point out how wide the distinction is between the declaration of the House of Commons in a matter of privilege, where itself is judge and party, and where the law provides no means of revision in any individual case, and the decision, even erroneous, even corrupt, of a court of justice between contending parties. I do not forget, but reserve for another place, the case of committals for contempts, which will be found, both as regards the house and courts of justice, to fall more properly under a different consideration.

But it is said that this and all other courts of law are inferior in dignity to the House of Commons, and that therefore it is impossible for us to review its decisions. This argument appears to me founded on a misunderstanding of several particulars; first, in what sense it is that this court is inferior to the House of Commons; next, in what sense the house is a court at all; and, lastly, in what sense we are now assuming to meddle with any of its decisions. Vastly inferior as this court is to the House of Commons, considered as a body in the state, and amenable as its members may be for ill conduct in their office to its animadversions, and certainly are to its impeachment before the Lords, yet, as a court of law, we know no superior but those courts which may revise our judgments for error; and in this respect there is no common term of comparison between this court and the house. In truth, the house is not a court of law at all, in the sense in which that term can alone be properly applied here: neither originally, nor by appeal, can it decide a matter in litigation between two parties; it has no means of doing so; it claims no such power: powers of inquiry and of accusation it has, but it decides nothing judicially, except where it is itself a party, in the case of contempts. As to them no question of degree arises between courts; and, in the only sense therefore in which this argument would be of weight, it does not apply. In any other sense the argument is of no force. Considered merely as resolutions or acts, I have yet to learn that this court is to be restrained by the dignity or the power of any body, however exalted, from fearlessly, though respectfully, examining their reasonableness and justice, where the rights of third persons, in litigation before us, depend upon their validity. But I deny that this inquiry tends to the reversal of any decision of the house; the general resolution and the *res judicanda* are not identical; the House of Commons has never decided upon the fact on which the plaintiff tendered an issue: that argument will be found *ov* and *by* to apply to the cases of committal for contempt, but it has no place in the consideration immediately before me.

Again, it is said that the jurisdiction of the House must be exclusive, because it proceeds, not by the common law, of which alone we are

cognisant, but by a different law, the parliamentary law, of which we are wholly ignorant. I cannot think that this argument is entitled to much weight. It is every day's practice with us to decide cases which turn upon the laws of foreign countries, or the laws administered in courts of peculiar jurisdiction in this country. Of these we have no judicial knowledge; but we acquire the necessary knowledge by evidence; and it is not denied that, where in a cause the question of privilege arises incidentally, this court must take notice of it and inquire into its existence and extent. What therefore it must do in some cases where the same difficulty exists, there can be no moral impossibility on that account of its doing in all.

This objection, however, leads me to observe that cases of privilege so called will often arise, where the question will be, not merely whether the privilege does exist, but whether the claim made can be reduced at all under any true definition of privilege. Privilege, if it be any thing but the mere declaration of the present will of the body claiming it, must be capable of some general fixed definition, however it may vary in degrees in different bodies. No lawyer, I suppose, now supports the doctrine of Blackstone, (1 Bla. Comm. 164,) that the dignity of the houses, and their independence, are in great measure preserved by keeping their privileges indefinite. But of privilege in the general we must be competent to form some opinion, because we have from time to time to deal with our own privileges. Let me suppose, by way of illustration, an extreme case; the House of Commons resolves that any one wearing a dress of a particular manufacture is guilty of a breach of privilege, and orders the arrest of such persons by the constable of the parish. An arrest is made and action brought, to which the order of the house is pleaded as a justification. The attorney-general has said that it is always a question of privilege, when it is a question whether the house has power to order the act complained of to be done; and that this question arises directly, whenever it appears by the record that the action is for that which the house has ordered to be done. In such a case as the one supposed, the plaintiff's counsel would insist on the distinction between power and privilege; and no lawyer can seriously doubt that it exists: but the argument confounds them, and forbids us to inquire, in any particular case, whether it ranges under the one or the other. I can find no principle which sanctions this.

I proceed now to examine a few and but a few of the very numerous authorities cited on this question. It does not appear to me at all necessary to go through many; for, whatever may be the weight of instances of acquiescence by individuals in the acts of the House of Commons, and, generally speaking, I consider it to be little or none, it is not so as between the House of Commons and the courts of judicature. The house has for centuries been feelingly alive upon questions of privilege; and for centuries it has been the most powerful body in the state: if therefore I find, in several well considered cases, the courts disclaiming to be bound by the resolutions of the house as to their privileges, and actually adjudicating upon them, without any or only with ineffectual remonstrance, I cannot but think such instances entitled to the greatest respect, and to be of quite sufficient force to establish a proposition which in itself is so consonant to reason.

I know it will be said that, in many of the cases alluded to, the question of privilege has arisen incidentally only, and that in such, ex neces-

sitate, the courts have interfered. In what sense "incidentally" is here used, has been often asked, and never as yet quite satisfactorily answered: in what sense a greater necessity exists in the one case than the other, has not been made out. The cases of habeas corpus are generally put as instances where the question arises directly. Let me suppose the return to state a commitment by the speaker under a resolution of the house ordering the party to capital punishment for a larceny committed; it will hardly be said that a stronger case of necessity to interfere could be supposed; and yet it must be admitted, on the other hand, that the question of privilege or power, between which the argument for the defendants makes no difference, would arise directly. A case therefore may be supposed in which it would be necessary to interfere, even where the so doing would be a direct adjudication upon the act of the house. It should seem, then, that some other test must be applied to ascertain in what sense it is true that the house can alone declare, and adjudicate upon, its own privileges.

I venture, with great diffidence, to submit the view which I have taken on these embarrassing questions, not as claiming the suspicious merit of novelty, but as one which will at least remove all difficulties in theory, and be found, I believe, not inconsistent with the general course of authorities. I say general course; for, during so long a series, carried through times so differing in political bias, and between such parties as either house of parliament on the one side, and the courts of law, individual judges, or litigant suitors, on the other, it would be quite idle to expect that any one uniform principle should be found to have invariably prevailed. In the first place, I apprehend that the question of privilege arises directly wherever the house has adjudicated upon the very fact between the parties, and there only; wherever this appears, and the case *may be* one of privilege, no court ought to inquire whether the house has adjudicated properly or not; but whether directly arising, or not, a court of law I conceive must take notice of the distinction between privilege and power; and, where the act has not been done within the house (for of no act there done can any tribunal, in my opinion, take cognizance but the house itself,) and is clearly of a nature transcending the legal limits of privilege, it will proceed against the doer as a transgressor of the law.

To apply these principles to the cases in which, on the return to a habeas corpus, it appears that the house has committed for a contempt in the breach of its privileges, I subscribe entirely to the decisions, and I agree also with the dicta which in some of them the court has thrown out on supposed extreme cases. In every one of these cases the house has actually adjudicated on the very point raised in the return, and the committal is in execution of its judgment. In all of them the warrant, or order, has set out that which on the face of it either clearly is, or may be, a breach of privilege, or it has contented itself with stating the party to have been guilty of a contempt without specifying the nature of it or the acts constituting it. *Brass Crosby's case*, 3 Wilson, 188, is an instance of the former; *Lord Shaftesbury's*, 1 Mod. 144, of the latter. The difference between the two is immaterial on the present question, which is one of jurisdiction only. Although in the case of an inferior court, over which this court exercises a power of revision and control even in matters directly within their cognizance, it will require to see the cause of committal in the warrant, yet, with regard to courts of so high a dignity as the Houses of Parliament, if an adjudication be stated, generally for a contempt, as

contempts are clearly within their cognizance, a respectful and a reasonable intendment will be made that the particular facts, on which the commitment in question has proceeded, warranted it in point of jurisdiction; for the propriety of the adjudication, that being assumed, would of course not be to be inquired into. But in both cases the principle of the decision is, that there has been an adjudication by a court of competent jurisdiction. Thus in the former, *De GREY*, C. J. says, (3 Wils. 199.)

“When the House of Commons *adjudge* any thing to be a contempt, or a breach of privilege, their *adjudication is a conviction*, and their commitment in consequence, is *execution*; and no court can discharge or bail a person that is in execution by the judgment of any other court. The House of Commons, therefore, *having an authority to commit*, and that commitment being an execution, the question is, what can this court do? It can do nothing when *a person is in execution by the judgment of a court having a competent jurisdiction*; in such case, this court is not a court of appeal.”

And in the latter, in which the main contest was on the generality of the order of the Lords, *RAINSFORD*, C. J. says, 1 Mod. 158, “The commitment in this case, is not for safe custody, but he *is in execution on the judgment* given by the Lords for the contempt, and therefore, if he be bailed, he will be delivered out of execution; because for a contempt *in facie curiæ* there is no other judgment or execution.”

The same principle will explain and justify the observations which have been made by different judges from time to time with regard to supposed cases, even of direct adjudication; and, if it should appear that the vice objected to the proceeding is not of improper decision or excess of punishment, but a total want of jurisdiction, in other words, where it is contended that either house has not acted in the exercise of a privilege, but in the usurpation of a power, it cannot be doubted that the same judges, who were most cautious in refraining from interfering with privilege properly so called, would have asserted the right of the court to restrain the undue exercise of power. The fact of adjudication then has no weight, because the court adjudging had no jurisdiction. Many such instances have been referred to in the argument. I pass over the luminous, and, as I think, still unanswered judgment of Lord *HOLT*, in *Regina v. Paty*, 2 Ld. Ray. 1012; (and “The Judgements,” &c. cited, p. 55, note *a*, ante,) which is bottomed on this principle; but I will cite, by way of illustration, the dicta of Lord *KENYON* and Lord *ELLENBOROUGH*, whom I select, not only for their pre-eminent individual authority, but also because I can cite from their judgments in cases in which they were with a firm and favourable hand upholding the just privileges of the Commons. And it is satisfactory to see that the distinction was even then present to their minds.

Lord *KENYON*, in *Rez v. Wright*, 8 T. R. 296, after saying, “this is a proceeding by one branch of the legislature, and therefore we cannot inquire into it,” immediately qualifies the generality of that remark, by adding, “I do not say that cases may not be put in which we would inquire whether or not the House of Commons were justified in any particular measure; if, for instance, they were to send their serjeant-at-arms to arrest a counsel here, who was arguing a case between two individuals, or to grant an injunction to stay the proceedings here in a common action, undoubtedly we should pay no attention to it.” In each case here supposed, there would have been a direct adjudication

upon the very matter, and in each there would have been a claim of privilege; but the facts would have raised the preliminary question, whether privilege or not: into that inquiry Lord KENYON would have felt himself bound to enter; and, when he had satisfied himself that there was no such privilege, the fact of adjudication would have become immaterial.

So in the most learned and able argument of Holroyd in *Burdett v. Abbot*, 14 East, 128, when he had put a case of the speaker issuing his warrant by the direction of the house to put a man to death, Lord ELLENBOROUGH interposed thus: "*The question in all cases would be, whether the House of Commons were a court of competent jurisdiction for the purpose of issuing a warrant to do the act. You are putting an extravagant case. It is not pretended that the exercise of a general criminal jurisdiction is any part of their privileges. When that case occurs, which it never will, the question would be whether they had general jurisdiction to issue such an order; and no doubt the courts of justice would do their duty.*" This case again supposes an adjudication; but can language be more clear to show the undoubting opinion of that great judge, that it would have been still open to this court to inquire into the jurisdiction of the house; and can any one seriously believe that the fact of a previous declaration by the house, that they had such jurisdiction, would have been considered by him as shutting up that inquiry?

Again, the same principle relieves me from all difficulty as to cases where, at first sight, the question appears to arise less directly, but where still the court of law would have to determine the case before it upon facts already directly adjudicated upon by the house. Such was the celebrated case of *Burdett v. Abbot*, 14 East, 1, in the decision of which I most heartily concur. There the action was trespass quare clausum fregit, and assault and false imprisonment; but the defence was a procedure in execution of a sentence of the House of Commons. If that sentence were pronounced by a competent court it warranted all that was done; the only question that could be made upon any principle of law was the competency of the adjudicating court: and, the competency of the house to commit for a contempt being not seriously doubted, there was a direct adjudication, into the propriety of which this court would not inquire. It could not inquire into it without trying over again what had already been decided in the house, i. e. whether Sir Francis Burdett had been guilty of a contempt; but this would have been contrary to the plainest principles of law. That this was the true principle of decision may be seen most simply from the narrow question put to the judges by the Lords, and the short judgment of Lord ELDON, when the case came before the house on writ of error. (5 Dow. 199, 200.)

Neither have I any difficulty with any of the cases in which the question arises upon any thing said or done in the house. In point of reasoning, it needed not the authoritative declaration of the bill of rights to protect the freedom of speech, the debates or proceedings in parliament, from impeachment or question in any place out of parliament; and that the house should have exclusive jurisdiction to regulate the course of its own proceedings, and animadvert upon any conduct there in violation of its rules, or derogation from its dignity, stands upon the clearest grounds of necessity. The argument, therefore, with which we were pressed, that if the defendants were liable to this action, the speaker

who signed the order for printing, and the members who concurred in the resolutions must be equally liable to be tried, on the ordinary principle of master and servant, has no foundation. It cannot be necessary to dwell on a distinction so well established; on the other hand, no conclusion in favour of the defendants can be drawn from the immunity of the speaker or the members in respect of any thing, done by them in the house, which occasioned the publication of the libel complained of, without. The order may be illegal, and therefore no justification to him who acts on it without; and yet the courts of law may be unable to penetrate the walls of the house, and give redress for any thing done within; just as the individual who executed an illegal order of the monarch would be responsible, although the constitution would allow of no proceeding against the monarch himself.

And now, having made these limitations clear, I would ask whether, subject to them, there is any reasonable doubt that it has been the practice of the courts to inquire into questions of privilege, a practice, considering all the circumstances, prevailing with remarkable uniformity, and traced from very early periods? It would be impossible for me within any reasonable limits to go through the series of recorded cases; and, after the judgments already pronounced, must be quite unnecessary; although to specify only a few may seem as if they alone were relied on. The case of *Donne v. Walsh*, 12 E. 4, 1 Hats. Pr. 41, and of *Ryver v. Cosyn* in the same year and same book, 1 Hats. Pr. 42, are important, as showing that at that early period, when the supersedeas of a cause was to depend on the extent of the parliamentary privilege, the inquiry was left to the judges of the court in which the cause itself was pending. In both instances, the Barons of the Exchequer take to counsel the judges of either bench, and, finding *quod non habetur nec unquam habebatur talis consuetudo* as that relied on for the supersedeas, disallow it, and order the defendant to answer to the declaration.

Ferrers's case, (1 Hats. Pr. 53,) in the reign of Henry VIII. is noticed by Mr. Hatsell, p. 53, as being the first instance in which the House of Commons took *upon themselves* to vindicate their privilege of freedom from arrest; (and see *Prynne's Reg. Part 4*, 855,) and, when that case is read at length, one cannot but observe indications of their proceeding, as if in the exercise of an untried power, with uncertain and somewhat inconsistent steps. The house is inflamed by the imprisonment and detention of their member, and the violent resistance to the serjeant; but what is their first step? They all retire to the upper house; the speaker states their grievance, the chancellor and the judges consider the matter, and, "judging the contempt to be very great," refer, "the punishment thereof to the order of the Commons' House." Then, the member being relieved, and the offenders against privilege having submitted and been punished, an act of parliament passes, after long debate, touching the member's debt; (a) the king comes to the parliament, and descants in large terms upon their privileges, founding himself on the information of his learned counsel; and the whole is concluded by the lord chief justice "very gravely" declaring "his opinion, confirming by divers reasons all that the king had said." Dyer, who, in an *Anonymous case* (b)

(a) To prevent the creditor from ultimately losing his demand.

(b) Moore, 57. Dyer's observation, and the opinion of the sages of the law, according to him, is against the enforcement of the privilege in this case, which he says was "minus just" And see *Prynne, Reg. Part 4*, 861. See also Hats. Pr. 58.

in Moore, p. 67, states the law as to one of the privileges of parliament, refers to this case, saying, "and so it was held by the sages of the law in the case of one Ferrers in the time of Henry VIII."

Cases and language such as the preceding seem to me to furnish the key to the true meaning of the expressions to be found in *Thorp's case*, 1 Hats. Pr. 28, and the 4 Inst. 15, on which so much reliance has been placed by the defendants. When the judges in that case speak of "a high court of parliament," "so high and mighty in his nature, that it may make law, and that that is law it may make no law," they cannot truly be speaking of either or both houses; and when they say, "that the determination and knowledge of that privilege belongeth to the Lords of the Parliament and not to the justices," it would be inconsistent with the general course of authorities to suppose they meant to represent themselves as really ignorant of the law of parliamentary privilege, and also with their going on immediately to inform the lords as to the course adopted with regard to parliamentary privilege in the courts below. The question indeed was one of privilege between the two houses, and the person of the Duke of York on the one hand, and the speaker on the other; and the judges, advisers of the peers as to all matters of common law, decline to advise the lords how to decide that question there, and this, considering the times, and the power of one of the litigants, with no very blameable reserve; at the same time they inform them of their own course of decision in such cases arising in their own courts below.

Benyon v. Evelyn (O. Bridgman's Judgments, 324,) has been so much discussed during the agitation of this question that I shall only refer to it. But I was indeed surprised to find it treated in the argument as bearing very lightly on the question, and the judgment of the lord chief justice therein characterised as a mere idle display of learning, unnecessary to the decision of the cause. That indeed was not a case in which the house took any part, and the privilege was sought to be used against the member; but how these circumstances detract from the effect of that decision as showing the constant interference of the courts of law in questions of privilege, I do not understand. If indeed it can be shown that the cases there relied on are unfairly selected, or unfaithfully reported, or if any sound distinction can be shown between the free discussion of one branch of the privilege of the house and that of another, the judgment there may not press upon the defendants: if these cannot be shown, and it was not attempted in the argument, it is all but decisive of the question.

The great case of *Ashby v. White*, 2 Ld. Ray. 938, decided by the court of last resort, and the modern but well considered cases in Chancery of Mr. *Long Wellesley*, 2 Russ. & Mylne, 639, and Mr. *Lechmere Charlton*, 2 Mylne & Cr. 316, (a) are all that I will further mention; and I will only mention them by name. Indeed, with the opinion which I

(a) In March 1815, Lord Cochrane, being in the King's Bench prison, under sentence for conspiracy, escaped, and went into the House of Commons, during the session of parliament, but not while the house was assembled. He was there retaken by the marshal. Lord Cochrane was at that time, and before the escape, a member of the house. The marshal stated the facts in a letter to the speaker, and the matter was referred to a committee of privileges, who reported that they found nothing in the journals to guide them; but, "That, under the particular circumstances given in evidence, it does not appear to your committee that the privileges of parliament have been violated, so as to call for the interposition of the house by any proceedings against the marshal of the King's Bench." March 23d, 1815. 1 Hats. Prec 278. Appendix, No. 5, 4th ed. 1818.

have upon the state of the authorities on this question, I seem to myself to have dwelt longer than I ought to have done on this part of the case. Limiting the interference of courts of law with the privileges of the House of Commons as I have done in the earlier part of my remarks, it appears to me to be quite unquestionable.

The less important question raised by the plea, but still a cardinal one to the decision of the case, remains to be considered as shortly as I can. Has the House of Commons the privilege of publishing and selling indiscriminately to the public whatever it orders to be printed for the use of the members? Or, conceding the resolution and order just stated to be identical in effect with the resolution of uncertain date stated at the end of the plea (which yet, considering their language, is a wide concession to make), is the power of publishing such of its votes, reports, and proceedings, as it shall deem necessary or conducive to the public interests, an essential incident to the constitutional functions of the Commons' House of Parliament?

The burthen of proof is on those who assert it; and, for the purposes of this cause, the proof must go to the whole of the proposition: its truth as to the votes, or even as to some of its proceedings, will not suffice. Now we have been referred to the report of the committee on the publication of printed papers, and with some emphasis we have been informed of the names of the individual members. The industry displayed in the former, and the well known learning and ability of the latter, are such, that we may safely say, if the proposition has not been demonstrated, it cannot be.

Si Pergama dextra
Defendi possent, etiam hæc defensa fuissent.

One thing is remarkable in this controversy. The privileges of parliament at different periods have engaged largely the attention of political writers, and parliament has never wanted zealous assertors to enumerate them; and no one can doubt of the extreme importance of this branch of them, if it had ever existed. I look to the report for authorities of this class, and I find it a perfect blank. If any thing could be added to that report, the argument for the defendants, it may be safely asserted, would have supplied it; that is equally a blank on this head. Nor am I able, and my brother PATTERSON, with far wider research, tells us that he is not able, to supply any authority to this effect. It is difficult to explain this in any manner consistently with its being a recognized privilege. General acquiescence might explain why there was no *case* to be found in support of it; but for the very same reason one should have expected to have found it enumerated in some or all of the text writers who have had to deal with the subject of privilege.

But, if not to be found in such works, nor evidenced by any resolution of the house prior to that of 1837, does it stand more securely on the testimony of the journals and proceedings of the house? It cannot be denied that the journals present evidence of the exercise of the right of publication; the question is, whether, all things considered, and specially the nature of the right on the one hand, and the imperfect state of the early journals on the other, it is sufficient in reason to establish its existence. For about the first century of the journals, from 1547 to 1641, nothing appears on the subject; but the time and occasion of the commencement of the precedents relied on, and the early precedents

themselves, are far more unfavourable to the right than the previous want of any. The time is 1641; the occasion the unhappy difference between the sovereign and the house: the precedents themselves direct acts moving in and towards the Great Rebellion. Mr. Hatsell, closing his first part, (1 Hats. Pr. 218, 223, ed. 1818,) says, "If I shall ever have leisure or inclination to continue this work, I shall think myself obliged to pass over every thing that occurred" "after this unhappy day" (the entrance of the king into the house), "and shall collect only such precedents as are to be met with" in the two parliaments of 1640, till the "4th of January, 1641, and then proceed directly to the Restoration." And I cannot but think that this part of the defendants' case would have stood better if the same discretion had guided the industry of those who collected their precedents, and if no reliance had been placed on these violent and irregular proceedings.

Passing from this inauspicious opening to the year 1660, and thence to the year 1835, I do not doubt that in a great many instances the House of Commons is shown to have printed and published votes, reports, and proceedings; the votes indeed with considerable regularity; but, as to the first of these, the right to publish is undisputed, and stands on a ground which leaves this question untouched. The term "proceedings" is so vague that I am unwilling to pronounce any opinion upon the right as to them generally; but no doubt there are many things, fairly reducible under that term, which the house would have the right to publish: and, as to their reports, a large proportion of them would contain nothing criminary of individuals, so as to raise no question upon the right. Now, when the necessary deductions are made in respect of all these considerations, and when, besides, we allow for the reluctance which individuals would have to litigation with so formidable an adversary as the house, even where the criminating matter in a report was false, and that it would be doubled where the matter was true, which in many instances it must in reason be taken to have been, the residuum of the evidence which may be fairly considered to support the right claimed is so small as entirely to fail in making it out. We have been obliged in this case to refer to what looks like evidence in fact, in order to ascertain the law: and evidence naturally bears with a different weight on different minds. I speak of my own impression; and, considering it merely as a question of evidence, I frankly avow that what has here been collected gives the claim to my mind the character much more of usurpation than lawful privilege.

But it may be said that necessity, or at least a strong expediency, prove the existence of the privilege, for they are the foundation of all privilege.

These may be essential to privilege; but I must take leave to deny that alone they can constitute it. The House of Commons is sometimes called the grand inquest of the nation; and to the discharge of its duty as such, who can doubt that the power to examine witnesses upon oath would be most conducive? To the perfect discharge of that duty who can doubt that in early times it was thought essential? Yet there is nothing clearer than that the house has not that power, and cannot by its own resolutions acquire it. The author of Junius's Letters, I think, lays down a safer rule: "To establish a claim of privilege in either house, and to distinguish original right from usurpation, it must appear that it is indispensably necessary for the performance of the duty they are employed in, and

also that it has been uniformly allowed." Letter xliv., vol. ii. p. 213, 2d ed. (Woodfall,) 1814.

Were I therefore to concede the necessity, or the strong expedience, one half only of the defendants' case would be made out; the objector would still appeal to the defective evidence of allowance, and the rule would hold "*Bonum ex causâ integrâ, malum ex aliqua parte.*" But I do not feel that I can make that concession. I will not put this upon the ground of inconsistency in the urging this argument for a body whose most undoubted and exercised privilege it is to exclude the public at pleasure from their debates; but, recollecting the great inconvenience of all injustice, the great advantage of maintaining the principle that even public benefits are not to be purchased by a violation of the sacred rights of individuals, recollecting how nearly all, if not all, the benefit of publicity may be secured, even when it is confined to matter not criminatory, I assert with the greatest confidence that the balance even of public expediency is in favour of a right of publication restricted by the limits of the common law. What advantage derived from publicity can be equal to the maintenance of the principle, that even to the representatives of the people, the most powerful body in the nation, the calumny of individuals is forbidden? What benefit can countervail the evil of a general understanding that any man's character is at the mercy of that body, and that *by the law*, not merely by the force of overbearing power, but by the rule of English law, for the sake of public expediency, he may be slandered without redress? I desire to avoid language that may have the semblance of offence: but I soberly ask the warmest advocate for this extended privilege, whether any benefit in a land, all the institutions of which seek the genial sunshine of public opinion and must languish without it, can make up for the injury resulting from this, that it should be capable of being said with truth, the House of Commons has become a trader in books, and claims, as privilege, a legal monopoly in slander?

If then I try this claim by the authority of text writers, by the evidence of precedents, by the test of expedience, or necessity, it seems to me in each and all of these to be signally wanting. I am therefore of opinion that the plaintiff is entitled to our judgment. I could wish that I had had leisure to express my reasons more concisely, and more clearly. I have examined the question, however, with an anxiety proportionate to its importance, and with a deep sense of the responsibility attaching to the decision; but I cannot say that I entertain the least doubt of its correctness.

We have been warned of the danger of a pursuit after popularity; advice no doubt tendered in a respectful and friendly spirit; advice most useful where needed. I trust that nothing we have said or done can fairly lay us open to the imputation of needing it. For myself I am afraid to quote a passage from the eloquent appeal of a great predecessor of my lord, (a) lest any one should suppose me weak enough to be thinking of a comparison with Lord Mansfield; but I *feel* the distinction between the popular favour that follows an honest course, and that which is followed after.

To speak of a contempt of the house, if "we assume to decide this question inconsistently with its determination," argues what I should call, if the language had not been used by those whom I am bound to revere,

(a) Lord Mansfield in *Rez v. Wilkes*, 4 Burr. 2562.

a strange obliquity of understanding. The cause is before us; we are sworn to decide it according to our notions of the law; we do not bring it here; and, being here, a necessity is laid upon us to deliver judgment; that judgment we can receive at the dictation of no power: we may decide the cause erroneously; but we *cannot* be guilty of any contempt in deciding it according to our consciences.

The privileges of the house are my own privileges, the privileges of every citizen in the land. I tender them as dearly as any member possibly can: and, so far from considering the judgment we pronounce as invading them, I think that by setting them on the foundation of reason, and limiting them by the fences of the law, we do all that in us lies to secure them from invasion, and root them in the affections of the people.

Judgment for the plaintiff

Second Year of the Reign of Victoria.—1838.

LORD DENMAN, C. J.
PATTESON, J.

WILLIAMS, J.
COLERIDGE, J.

(a) "An Act to enable Her Majesty's Courts at Westminster to hold Sittings in Banc in Time of Vacation."

Sect. 2 enacts "That such sittings in vacation may be holden by virtue of a rule or order of the said Courts respectively to be made in or cut of term, whereof a week's notice shall be published in the London Gazette, and affixed in some conspicuous place on the outside of such Courts respectively making such order, and also in the chambers of the Judges or Barons of the same Courts respectively, and in the office of the Masters of the same Court, in the following form :

‘This Court will on the _____ day of _____ hold sittings, and will proceed in disposing of the business now pending in the special paper on the _____ day of the same month, and the _____ following days, and on the _____ day of the same month will proceed in disposing of the business now pending in the paper of new trials.

Sect. 3 enacts "That all judgments to be pronounced and all rules and orders to be made by virtue of this act shall have the same effect, to all intents and purposes, as if they had been pronounced or made in term time."

FERGUSON against MAHON.—p. 245.

Declaration in debt for two years' rent, at 90*l.* per annum, due 1st November, 1836; the particulars of demand giving credit for the first of the two years' rent, less 16*l.* 16*s.* 6*d.* Fleas, as to 135*l.*, parcel of the said rent, that plaintiff held as tenant to C.; that before and at the time when the said 135*l.* became due, 135*l.* was in arrear from plaintiff to C., who claimed it of defendant, and defendant paid it to C. to avoid a distress. Replication, admitting the payment to C., but averring that the sums paid by defendant were deducted from money due at the time of payment from defendant to plaintiff; and that, at the commencement of the action, 135*l.* was due from defendant to plaintiff, beyond the sum so paid. Rejoinder, that the sums were not so deducted, and traversing that 135*l.* was due beyond the sums paid.

Held (before the operation of rule of Trin. 1 Vict., as to not pleading payments allowed in particulars of demand) that, assuming the declaration to be only for the balance of 106*l.* 16*s.* 6*d.* (but *semble contra.*) and the defendant as pleading to that only (though the court considered that the plea was really pleaded to more, yet the replication denied that the payments were applied to that balance, and the rejoinder took issue thereon; and therefore plaintiff might prove that the payments applied to debts independent of the balance, and left the balance still due.

This cause was tried before Lord DENMAN, C. J., at the London sittings after last Trinity term, when a verdict was found for the plaintiff, leave being reserved to move to enter a nonsuit. *Humfrey*, in the last term (November 5th,) moved^(a) according to the leave reserved. The facts and arguments will be sufficiently collected from the judgment.

Cur. adv. vult.

Lord DENMAN, C. J. now delivered the judgment of the court.

This was an action of debt. The second count, on the pleadings to which this question arises, was on an indenture of lease to hold from the 1st November, 1829, for seven years, at 90*l.* per annum; and the count claimed two years' rent due 1st November, 1836.

The defendant pleaded, as to 135*l.*, *parcel of the said rent*, that the plaintiff held the premises as tenant to one Carter, at 90*l.* per annum; that, *before and at the time when the 135*l.* in the plea mentioned became due*, 135*l.* was in arrear from the plaintiff to Carter, who claimed the same of the defendant; and that the defendant, to avoid a distress upon his goods, paid to Carter several sums of money, amounting to 135*l.*

The plaintiff replied, admitting the payment to Carter, but stating that the several sums of money were deducted by defendant, at the several times when they were paid, out of rent due *at those times* from the defendant to the plaintiff; and that, at the commencement of this suit, 135*l.* was due from the defendant to the plaintiff for rent, over and above the several sums so paid and deducted by the defendant.

The defendant rejoined that the several sums were not deducted by the defendant in the manner alleged; *without this*, that 135*l.* is due and owing over and above the said payments. The other pleadings were immaterial to this question.

At the trial, it appeared that 106*l.* 16*s.* 6*d.* was due to the plaintiff, after allowing all payments; and a verdict was taken for that amount.

Mr. *Humfrey* moved to enter a nonsuit, upon the ground that the particulars of demand in this case give credit for the first of the two years' rent claimed in the declaration, less 16*l.* 16*s.* 6*d.*; that those particulars must be taken as part of the declaration, and the plea must be taken as pleaded to the balance, viz. 106*l.* 16*s.* 6*d.*; and that, as the replication

(a) Before Lord Denman, C. J., Patteson, Williams, and Coleridge, Js.

admits the payment of 135*l.* stated in the plea, which is a larger sum than that balance, the plaintiff, by his own showing, is out of court; and he cited *Booth v. Howard*, 5 Dowl. P. C. 438, *Nicholl v. Williams*, 2 M. & W. 758, *Kenyon v. Wakes*, 2 M. & W. 764, in support of these positions, and, principally, to show that the particulars of the plaintiff's demand must be taken as part of the declaration, not only for purposes of evidence, but for purposes of pleading.

We do not think that those cases establish any such point: nor, as at present advised, are we prepared to agree with them if they did. But the point is not material to the decision of this case. For, if it be conceded, for the sake of the argument, that the declaration, as explained by the particulars, claims a balance of 106*l.* 16*s.* 6*d.*, and that the defendant has attempted to plead to that balance only (which however it is plain he does not, since he pleads expressly as to 135*l.*, *parcel of the rent mentioned in the declaration*, thereby professing that more than 106*l.* 16*s.* 6*d.* is claimed by the declaration, and actually pleading to more,) yet the replication, in terms, states that the payments attempted by the plea to be applied to that balance of 106*l.* 16*s.* 6*d.* were applied to another and different demand, viz. to prior rent, and the rejoinder in substance takes issue on that very question of application, which has been found, and rightly found, for the plaintiff.

In any view of the case, therefore, this verdict is right, and no rule for a nonsuit is to be granted.

Rule refused. (a)

(a) See *Freeman v. Crafts*, 4 M. & W. 4.

ALSTON and Another against MILLS.—p. 248.

Assumpsit, stating that defendant owed plaintiff 883*l.* for goods sold and delivered; but that, although he has paid 664*l.*, the residue is unpaid. The particular of demand claimed a balance of 219*l.*

Plea, payment to the amount of all the moneys mentioned in the declaration. Replication, new-assigning, as to so much of the plea as relates to 175*l.*, parcel of the moneys in the declaration mentioned, that the action is brought, not for a part of the causes of action mentioned in the plea, to the amount of 175*l.*, in respect of which defendants paid plaintiffs a part of the sums in that plea mentioned, viz. 175*l.*, but for breach of a promise to pay plaintiffs another and a different sum, viz. 175*l.*, part of the moneys in the first count mentioned, and in which defendant was indebted to plaintiff as there mentioned, for goods sold and delivered between June 1st, 1836, and December 20th, 1837; which promise was made as in the declaration mentioned, and is different from the promise to pay the 175*l.* so paid to plaintiffs, and the causes of action in respect thereof. And, as to the residue of the causes of action in the declaration mentioned, that defendant did not pay the residue of the sums, &c.

Rejoinder. 1. Payment of all the moneys claimed by the new assignment. *Traverse*, and issue thereon. 2. That the promise mentioned in the declaration, as to 175*l.*, is not a different cause of action from the promise to pay 175*l.* so paid to plaintiffs, and the causes of action in respect thereof. Issue thereon.

On the trial, plaintiffs proved, among other demands (not available in this action,) goods supplied to the amount of 370*l.*, and payments to the amount of 312*l.*, leaving a balance not in point of fact covered by the payment of 175*l.* admitted in the replication. Verdict for plaintiff, 58*l.*

Motion for a nonsuit, on the ground that the declaration claimed only a balance of 219*l.*; that the first plea related to that only; that the replication admitted a payment 175*l.*; that the plaintiff's claim, therefore, on the record, was only for the difference between that sum and 219*l.*; and that defendants had proved payment of 312*l.*

Held, that plaintiff was entitled to recover. For,

1. That the plea of payment was not confined to the balance.

2. That the admission, in the new assignment, of 175*l.* having been paid, was not an admission of payment in respect of the balance of 219*l.*, but was, by the language of the new assignment it, a virtual allegation that the 175*l.* was part of the 66*l.*, admitted in the declaration to have been paid.

ASSUMPSIT. The declaration stated that defendant, on 20th December, 1837, was indebted to plaintiffs in 883*l.* 16*s.*, for goods before then sold and delivered, and in the same amount for money found due on an account then stated, &c., and, being so indebted, promised, &c. And, although defendant in part performance of his promise has paid plaintiffs divers sums, &c., amounting together to 66*l.* 3*s.* 6*d.*, parcel of the said several sums of money, yet defendant has not further performed, &c.; but on the contrary has not paid the residue, &c.

Pleas. 1. Non assumpsit. 2. That, before the commencement of this suit, viz. on, &c., and on divers other days, &c., defendant paid plaintiffs divers sums, &c., amounting to a large sum, viz. to the amount of all the moneys in the declaration mentioned, in full satisfaction of all the causes and rights of action in the declaration mentioned, which payments the plaintiffs accepted, &c. **Verification.** 3. A set-off.

Replication. 1. Joining issue on the 1st plea. 2. As to so much of the 2d plea as relates to a certain part of the causes and rights of action in the declaration mentioned, viz. to 175*l.* 17*s.*, parcel of the moneys in the 1st count mentioned, that plaintiffs sued, &c., and declared, &c., not in respect of a certain part of the causes and rights of action in the said second plea mentioned, to wit, causes and rights of action to a large amount, viz. 175*l.* 17*s.*, and in respect of which last mentioned causes and rights of action the said defendant paid to the plaintiffs a part of the sums of money in the said second plea mentioned, to wit sums of money amounting in the whole to a large sum of money, viz. 175*l.* 17*s.*, but for the nonperformance of a promise to pay the plaintiffs another and different sum, viz. 175*l.* 17*s.*, parcel of the moneys in the first count of the declaration mentioned, and in which sum of 175*l.* 17*s.* the defendant was indebted to the plaintiffs as in that count mentioned, for the price and value of goods sold and delivered by the said plaintiffs to the defendant, and at his request, between the 1st June, 1836, and the said 20th December, 1837; which promise was made by the defendant to the plaintiffs in manner and form as the said plaintiffs have above thereof in the said declaration complained against the said defendant; which promise in the said declaration mentioned, as to the said 175*l.* 17*s.*, parcel, &c., is another and different promise and cause and right of action to the promise to pay the said 175*l.* 17*s.* so paid to the plaintiffs, and the causes and rights of action in respect thereof. **Verification.** 3. As to so much of the second plea as relates to the residue of the causes and rights of action in the declaration mentioned, other than the said causes, &c. as to the said 175*l.* 17*s.*, parcel of the moneys in the first count mentioned, that defendant did not pay plaintiffs the residue of the said sums in the second plea mentioned, &c. (traversing the payment in satisfaction, and acceptance,) in manner and form, &c. **Conclusion to the country.** 4. Traverse of the set-off. **Conclusion to the country.**

Pleas to the new assignment. 1. That on 1st December, 1832, and on divers other days, &c., defendant paid plaintiffs divers sums, &c., in the whole, &c., to wit the amount of all the moneys claimed by the said new assignment, in full satisfaction of the cause and right of action above newly assigned, and plaintiffs then accepted, &c. **Verification.** 2. As

to the same promise and cause of action, that plaintiffs, before and at the time of the commencement of this suit were and still are indebted, &c. (set-off to the damages claimed under the new assignment.) 3. As to the same promise and cause of action, that the promise mentioned in the declaration as to 175*l.* 17*s.*, parcel, &c., is not another and different promise and cause of action from the promise to pay 175*l.* 17*s.* so paid to the said plaintiffs, and the causes and rights of action in respect thereof, in manner and form, &c. Conclusion to the country. 4. and 5. Joining issue on the other parts of the replication.

Replication to the pleas to the new assignment. 1. Traversing the payment and acceptance in satisfaction of the cause of action newly assigned; conclusion to the country. Issue thereon. 2. Traverse of the set-off. Conclusion to the country. Issue thereon. 3. Joining issue as to the identity of the causes of action in respect of 175*l.* 17*s.*

The plaintiffs delivered a particular of demand, stating in one column the items of charge (from June 1836 to September 1837,) and in another the payments admitted (from August 1836 to September 1837,) and claiming a balance of 219*l.* 12*s.* 6*d.* And, on new assigning, they again delivered a particular containing the same items on both sides, and demanding the same balance, headed, "The plaintiffs under the new assignment in this action seek to recover the sum of 175*l.* 17*s.*, being a part of the under-mentioned balance of 219*l.* 12*s.* 6*d.* due to the plaintiffs from the defendant upon the following account."

On the trial before PATTESON, J., at the last Maidstone assizes, it appeared that the defendant (a fishmonger) had been in the habit of receiving oysters from the plaintiffs to sell, from 1833 till the latter part of 1837, but that he received them as purchaser during the last mentioned year only, having before that time sold as agent for the plaintiffs. That the price of the oysters furnished to defendant in 1837 was 370*l.* 16*s.* 6*d.*; the amount paid by him in the course of that year, 312*l.* 15*s.* The sum of 883*l.* 16*s.*, claimed in the declaration, was partly made up of items stated to have accrued in previous years. The learned judge was of opinion that, if the prices charged were fair, the plaintiffs were entitled to recover 58*l.* 1*s.* 6*d.*, the difference between 370*l.* 16*s.* 6*d.* and 312*l.* 15*s.*; and a verdict was taken for that sum, leave being reserved to move for a nonsuit, on the grounds hereafter stated.

Ogle, in last Michaelmas term, (November 5th. Before Lord DENMAN, C. J., PATTESON, WILLIAMS, and COLERIDGE, Js.) moved according to the leave reserved. The grounds of motion will sufficiently appear by the judgment.

Cur. adv. vult.

Lord DENMAN, C. J. now delivered the judgment of the court.

The pleadings in this case are somewhat confused, and have given rise to a question, whether the plaintiff is not, on the true construction of them, out of court.

The declaration is for goods sold and delivered to the amount of 883*l.* 16*s.*, and states that, although 664*l.* 3*s.* 6*d.* has been paid, the remainder has not. It claims, therefore, 219*l.* 12*s.* 6*d.* The second plea pleads generally payment of *all sums of money mentioned in the declaration*. The replication, as to 175*l.* 17*s.*, part of the moneys mentioned in the first count, states, by way of new assignment, that the plaintiff sued out his writ, not for the causes of action in respect of which that sum of 175*l.* 17*s.* was paid, but for a like sum on other and different promises

viz. for goods sold and delivered between the 1st of June 1836 and the 20th of December 1837; and, as to the rest of the moneys alleged to be paid, denies the payment. To the new assignment the defendant pleads: 1st. A general plea of payment: 2dly, That the causes of action as to the 175*l.* 17*s.* are not other and different. Upon those pleas issue is joined. At the trial it was proved distinctly that the causes were other and different, and that on the whole accounts a balance of 58*l.* 1*s.* 6*d.* was due, for which the verdict was taken. Mr. Ogle moved for a nonsuit, contending, as he did at the trial, that as the declaration claims a balance of 219*l.* 12*s.* 6*d.* only, the first plea of payment must be taken as pleaded to that balance only; that the replication, by way of new assignment, having admitted the payment of 175*l.* 17*s.* as alleged in the plea, it was sufficient for the defendant to prove payments making up the difference between 219*l.* 12*s.* 6*d.* and 175*l.* 17*s.* (a); and that, he having done so, the plaintiff was out of court. We think that the view so taken of the pleadings is wrong in two respects.

First. The plea of payment is not confined to the balance claimed in the declaration. It is pleaded in terms that the defendant has paid all the sums of *money mentioned in the declaration*; and there is nothing to prevent our giving the words their natural meaning, which is, that the defendant has paid, not only the sums *admitted* by the declaration, but also all other sums mentioned in it.

Secondly. The replication does not admit the payment of 175*l.* 17*s.*, as stated in the plea, that is to say, as made in respect of the balance claimed, although it does admit that it was made in respect of causes of action *mentioned in the declaration*; for it expressly states that the plaintiff brought his action, *not* for the causes of action in respect of which that admitted sum of 175*l.* 17*s.* *was paid*, but for other and different causes accruing within a specified period of time, which, in effect, amounts to this, that the sum of 175*l.* 17*s.* is part of the money admitted in the declaration, and the action is brought for the balance in respect of other and different causes of action. The defendant has denied that the causes of action were other and different; and that has been found against him. Whether the plaintiffs might or might not have treated the first plea of payment as applicable to the balance only, and replied by denying *any* payment beyond that admitted in the declaration, is not now the question. It is plain that the words of the plea are not necessarily so limited; and the plaintiff was not bound to consider them as so limited. Neither is it now necessary to inquire why the particular sum of 175*l.* 17*s.* was mentioned in the replication; the reason for which does not appear. The substance of the issue is, whether the defendant has paid *all* that is due; and, that issue having been tried, no ground is shewn to us sufficient to disturb the verdict.

No rule is to be granted. It is highly satisfactory to us to find a similar view taken of this point by the Court of Exchequer in *Freeman v. Crafts*, 4 M. & W. 4. Rule refused.

(a) Ogle contended, in moving, that this must be so unless the plaintiffs could prove a second unpaid balance, and he cited *Hall v. Middleton*, 4 A. & E. 107; 31 Eng. Com. Law Reps. 40.

The following cases, as far as *Regina v. The Inhabitants of Somerby* inclusive, (with the exception of *Wheeler v. Haynes*.) are reported by Edward Smirke, of the Middle Temple, Esquire, Barrister at Law.

ALLASON and Others v. STARK.—p. 255.

Stat. 59 G. 3, c. 12, s. 17, does not vest the legal estate of charity lands in the parish officers, where there are known feoffees in existence, and where the trust funds are applicable only to certain specified objects partially in aid of the parish funds. Therefore, where lands were vested in trustees under a charitable bequest, on trust to apply half the rents towards the relief of poor people of good life and conversation in the parish, and half for apprenticing poor boys of the parish: Held, that the legal estate was not transferred to the parish officers under stat. 59 G. 3, c. 12, s. 17, although, by a local act, a portion of the rents was applied to the expense of erecting the parish workhouse, and paying off moneys borrowed for that purpose.

A dispute having arisen between trustees for the poor under a local act, and the trustees of certain charity lands, respecting the liability of the former to pay rent to the latter for a workhouse built on the charity land, an amicable suit was instituted in the Rolls Court, and an order obtained for payment of a certain rent in respect of the said land: the trustees for the poor acquiesced in the order, and paid rent accordingly for twelve years: Held, that they could not afterwards dispute their liability in an action for use and occupation.

USE and occupation. The action was brought in respect of land in the parish of Kensington, Middlesex. On the trial before Lord DENMAN, C. J., a verdict was found for the plaintiffs, subject to the opinion of this Court on the following case.

The plaintiffs were trustees of the Cambden charity estates mentioned in stat. 17 G. 3, c. 64, "for the better relief and employment of the poor of the parish of St. Mary Abbots, Kensington," &c. The defendant was one of the trustees for executing the above act, and was sued as such under the provisions of 7 G. 4, c. cxiii. (local and personal public) s. 37, (for amending and enlarging stat. 17 G. 3, c. 64.)

Elizabeth, Viscountess Cambden, by her will made in 1643, bequeathed to certain trustees therein named, and to the churchwardens of the above parish, a sum of money to be laid out in lands of inheritance of the yearly value of 10*l.*, upon trust, as to one moiety thereof, from time to time, yearly, for ever, "for and towards the better relief of the most poor and needy people that be of good life and conversation, that should be inhabiting within the said parish; the other moiety yearly for ever to put forth one poor boy or more, being of the said parish, to be apprentice or apprentices, and the 5*l.* which shall be due to the poor of the said parish to be paid to them every half year, &c., at and in the church or porch thereof." In pursuance of this bequest, a piece of land called Butt's Field was purchased and conveyed to the trustees named in the will, and at the passing of the act 17 G. 3, c. 64, formed part of the charity estates therein named.

The act 17 G. 3, c. 64, recited (sect. 1) that the above land called Butt's Field, together with other land purchased with a legacy left by Viscountess Cambden "to be yearly employed for the good and benefit of the poor of the town of Kensington for ever, in such manner as certain trustees therein named, since deceased, and the churchwardens of the parish of Kensington for the time being, should think fit to establish," and also other land and buildings, were vested in certain trustees, their heirs and assigns, upon the trusts declared in the wills of Lord and Lady Cambden, with power to appoint new trustees when necessary: that it was desirable that the trustees should be able to grant building and other beneficial leases of the charity land, and that the "rents, profits, and produce of such part of the said charity estates *as belong to the poor of the said parish* be from time to time applied in aid of the poor rates, for

paying the interest of moneys to be borrowed, or annuities to be granted for raising moneys to be invested and applied in the purchase of ground, and erecting, building, and furnishing a proper workhouse," &c., for the poor of the said parish, &c. : and that it would be beneficial to the parish and conducive to the improvement of the charity estates, if the trustees thereafter named (that is, the trustees for putting the act in execution) were empowered to contract for and build a workhouse, and for that purpose to raise moneys by way of annuity, or otherwise, upon the credit of the rates, and if the trustees of the charity estates were enabled to grant or demise the same for the purposes aforesaid, and "to appropriate the parts or shares of rents and profits thereof belonging to the poor of the said parish in aid of such rates during the lives of the respective annuitants, or until the moneys to be borrowed for the purposes aforesaid shall be fully paid and satisfied." The act then (sect. 1) authorized the charity trustees to grant long leases of Butt's Field and the other charity lands, by public auction, to persons willing to build upon them, with all common covenants for payment of rent, repairs, &c. The act further directed (a) that 54*l.* per annum should be thereafter applied to apprenticing poor boys, according to Lady Cambden's will, and that all the other rents of the charity estates should be from time to time paid over by the charity trustees to certain trustees named for executing the act, to be by them applied to purchasing ground, building, hiring, and furnishing a workhouse, and paying moneys borrowed and annuities granted under the act, in aid of the poor rates, until all the moneys so borrowed should be repaid, and all the annuitants should be dead; after which the trustees of the charity estates were to apply all the rents for the purposes set forth in the wills of Lord and Lady Cambden. Power was also given (sect. 19) to the trustees for executing the act, to agree for the purchase or hire of such land or buildings as they should deem convenient for the reception, employment, &c., of the poor of the parish;

(a) Sect. 8. "Be it further enacted by the authority aforesaid, that, from and after the 20th day of September, 1777, the sum of 54*l.* per annum, being the whole amount of the present yearly rents and profits of the charity estates above mentioned, (of which the said field called Butt's Field is little more than one half,) shall from time to time thereafter be paid and applied to and for the putting out one or more poor boy or boys of the said parish of Kensington apprentice or apprentices, according to the directions of the said will of the Elizabeth Viscountess Dowager Cambden deceased: and that all other the rents, profits, fines, and produce to be thereafter made of all or any part of the above-mentioned charity estates, shall, from time to time, as the same shall or may be received by the said trustees or their successors, or their attorneys or agents, be by them and every of them paid over unto the trustees hereinafter nominated and appointed for putting this act into execution, and their successors, or to their treasurer or treasurers for the time being, or whom else they shall from time to time think fit to nominate or appoint for that purpose, to be applied and disposed of, and the same is hereby directed to be applied and disposed of for and towards the purchasing of ground, and building, hiring, and furnishing of a workhouse and other accommodations for the reception and employment of the poor of the said parish, or for payment of the moneys to be borrowed and annuities to be granted by virtue of the powers and authorities hereinafter granted to them, in aid of the rate or rates to be hereafter made for the relief of the poor of the said parish, until such time as the whole of the moneys, so to be borrowed for the purposes aforesaid, with interest, shall be repaid, and all the said annuitants to whom such annuities shall or may be granted shall happen to die: and from and after the moneys so to be borrowed upon the credit of such rates shall be repaid with interest, and if all the said annuitants shall happen to die, then the said trustees of the said charity estates for the time being do and shall, and they are hereby authorized and required to pay and apply all the said rents, issues, and profits thereof, to and for the uses and purposes mentioned and set forth in the said wills of the said Baptist Lord Viscount Cambden and Lady Elizabeth Viscountess Cambden, and in the said indentures of lease and release hereinbefore mentioned."

and they were authorized and required (sect. 21(a)) to erect one or more house or houses for the poor, "upon either part of the said charity estates belonging to the poor of the said parish, or upon any ground to be either purchased or hired for that purpose, and to pay the expenses of building by and out of the moneys to arise by virtue of that act."

The trustees of the charity estates, after the passing of stat. 17 G. 3, c. 64, from time to time let the estates under the powers of the act, and they still continued to exercise such powers; and the trustees for executing the act shortly after the passing of the act built a workhouse on a part of Butt's Field.

In February 1821, disputes arose between the two sets of trustees concerning the liability to pay rent for the workhouse, and the amount of rent, if any, to be paid; and thereupon an amicable suit was commenced by petition in the Rolls Court, in which the charity trustees insisted that the trustees under stat. 17 G. 3, c. 64, should pay them a fair rent for the use and occupation of the land on which the workhouse was erected. On 14th February, 1821, it was declared by an order of that Court that the trustees of the charity were seised in fee of the said land and premises; and it was ordered to be referred to a Master to state what rent the trustees for executing the act should pay to the charity trustees for the land. The Master reported, on 14th January, 1822, that 40*l.* per annum was a fit and proper rent to be so paid for the land, from 7th February, 1821; and an order was made accordingly. In this suit the same solicitor acted for both parties.

From that time until February 1833 inclusive, the trustees under the act regularly paid the rent of 40*l.* to the charity trustees; and the defendant, who became a trustee for executing the act, in 1828, and had continued so ever since, was present, as such, at a meeting of trustees in 1829, at which they passed a resolution to pay the said rent. The defendant, on that occasion, neither assented to nor dissented from such resolution, although he had on several occasions expressed his opinion that such rent ought not to be paid.

If the Court should be of opinion that the trustees of the charity were entitled to recover payment of the rent in this action from the trustees for executing the act, the verdict was to stand; otherwise a nonsuit to be entered.

The questions for the opinion of the Court were, firstly, whether the legal estate in the land, at the time of action brought, was in the charity

(a) Sect. 21. "And be it further enacted, that the said trustees" (*i. e.* the trustees appointed by the act), "or any twenty-five or more of them, shall and may, and they are hereby authorized and required to erect, or cause to be erected, one or more house or houses, and such other buildings as they shall think necessary, upon either part of the said charity estates belonging to the poor of the said parish, or upon any ground to be either purchased or hired for that purpose, for the residence and employment of the poor of the said parish; and from time to time to furnish and provide the same with bedding, and all other necessary furniture and materials, for the proper and comfortable support, maintenance, and employment of the poor of the said parish, and to contract and agree with artificers, workmen, and other persons, for the building, furnishing, and providing for the same; and by and out of the moneys to arise by virtue of this act to pay and satisfy all moneys which shall be justly due and owing to such artificers, workmen, or others employed in or about the building or furnishing the said house or houses, or any matter or thing relating thereto; copies or extracts of all which contracts or agreements made by or with such artificers or workmen and others, and all receipts, payments, debts, and credits, and all other matters and proceedings concerning the same, shall be entered in a book or books to be kept for those purposes; which book or books shall from time to time, and at all convenient times, be open to the inspection and perusal of all persons paying any rate or assessment to be made by virtue of this act."

trustees, or was vested in the churchwardens and overseers by stat. 59 G. 3, c. 12, s. 17; secondly, whether the defendant was not estopped, under the circumstances of the case stated, to deny the plaintiffs' title to the rent in arrear.(a)

Sir W. W. Follett for the plaintiffs. 1. It is contended by the defendant that, supposing rent to be payable in respect of the workhouse built on the charity land, the plaintiffs are not the proper persons to sue, because, by the operation of stat. 59 G. 3, c. 12, s. 17, the legal estate is now vested in the churchwardens and overseers of the poor; and *Doe dem. Jackson v. Hiley*, 10 B. & C. 885, (21 E. C. L. R.), is relied on. But that act does not extend to a case like the present, in which there is a subsisting tenancy under the trustees for the charity. The lands here are not lands "belonging to the parish." The trustees need not apply the profits in the ordinary course of parish relief, but may and ought to exercise a discretion as to the objects of charity. These objects are specifically pointed out in the will of Lady Cambden; half the profits are to be applied to the relief of poor persons of good life and conversation, and half to the apprenticing of boys. The act 17 G. 3, c. 64, makes a temporary change in the application of the charity; but a certain sum is still to be applied to apprenticing boys, and the residue is to be paid to the trustees for executing that act, to be by them applied to the purchase or hire of a workhouse, and to the payment of moneys borrowed on annuity or otherwise: when this special purpose has been fulfilled, and the moneys paid, the profits then revert to the charity trustees, to be disposed of in conformity with the directions of the will. In *Rex v. Halesworth*, 3 B. & Ad. 717, (23 E. C. L. R.), the rents, under a similar charitable devise, were held not to be a "public parochial fund" within stat. 56 G. 3, c. 139, s. 11; and the case was there expressly distinguished from that of a devise for the relief of the poor generally. 2. Independently of the construction of the act, the parties represented by the defendant, having concurred in submitting their liability to the decision of the Master of the Rolls, and having acquiesced in that decision for twelve years, are now precluded from denying either the amount of rent or the liability to pay it.

Sir J. Campbell, Attorney-General, contra. The charity estates are lands "belonging" to the parish within stat. 59 G. 3, c. 12, s. 17. They are referred to in the preamble of stat. 17 G. 3, c. 64, and in sect. 21, as "belonging to the poor." Stat. 59 G. 3, c. 12, was passed to obviate the difficulty of making a title to lands where the heirs or feoffees could not be found; it therefore transfers the legal estate of all parish lands to the parish officers. [Lord DENMAN, C. J. The statute was passed in remedy of cases where the officers had dealt with property devised for the benefit of the poor without strict title. Can it apply where there are trustees appointed and known? PATTESON, J. If it was intended, in all cases, to transfer the legal estate to the parish officers, why not at once enact, in express terms, that it should be so transferred? The words of the act are, that the churchwardens, &c., shall be empowered "to accept, take, and hold."] The legal estate must, in every case, be somewhere, either in an heir or some surviving devisee

(a) There was a further question, whether the trustees for executing the act of 17 G. 3, c. 64, were not empowered by that act (especially by sect. 21) to erect the workhouse on part of the charity lands without paying any rent. On this last question the Court held that the trustees were not empowered to do so without payment of rent; but, as this point is of no general interest, the argument and judgment thereupon are omitted.

or trustee; therefore the act must, at all events, have the effect in every case of transferring it from some one to the parish officers. [COLERIDGE, J. Suppose the testator directed some special application of the profits to be made by the trustees, are the overseers bound so to execute the trusts, or may they apply them to general parish purposes?] In such a case, it must be admitted that the funds cannot be applied to such general purposes; but *Doe dem. Jackson v. Hiley*, shows that this is no criterion, for the funds in that case were applicable only to purposes for which church rates are levied. [COLERIDGE, J. *Doe dem. Higgs v. Terry*, 4 A. & E. 274, (31 E. C. L. R.), (a) is in your favour to a certain extent.] Then as to the estoppel, the order of the Master of the Rolls cannot be binding in an action for use and occupation. The action is against a public trustee, who cannot be estopped, and will be personally liable if the judgment be for the plaintiffs. Possession of the land was given to the trustees under the act, not by the plaintiffs, or by their assent or agreement, but by the law; for sect. 21 of stat. 17 G. 3, c. 64, gives them a right to build on it; they are therefore not estopped by payment of rent; *Rogers v. Pitcher*, 6 Taunt. 202, (1 E. C. L. R.) In *Gravenor v. Woodhouse*, 1 Bing. 38, (8 E. C. L. R.), even attornment, which is stronger than payment of rent, was held not to estop. Payment of rent made under a mistake is no estoppel; *Gregory v. Doidge*, 3 Bing. 474, (11 E. C. L. R.); nor if the lessor's interest is expired; *Brook v. Biggs*, 2 New Ca. 572, (29 E. C. L. R.) Besides, for many years after the passing of stat. 17 G. 3, c. 64, until 1821, no rent at all appears to have been paid.

Sir *W. W. Follett*, in reply. *Doe dem. Jackson v. Hiley*, 10 B. & C. 885, (21 E. C. L. R.) is not in point. In that case the origin of the parish property did not appear; the feoffees were all dead; nor were there any feoffees in existence who held the land for purposes other than strictly parochial. If the rents cannot be applied (as is admitted) to the general parish fund, then the case is not within stat. 59 G. 3, c. 12, s. 17. It is not clear that the estates alluded to in sect. 21 of stat. 17 G. 3, c. 64, as "belonging to the poor" are the same as the land on which the workhouse is built; for the same persons appear by that act to be trustees of other lands besides Butt's Field. If the argument for the defendant is to prevail, then, even after the loan is repaid, and the annuitants are all dead, the trustees under Lady Cambden's will can receive no rents for the purposes of their trust. As to the estoppel; in *Doe dem. Morris v. Rosser*, 3 East, 11, even an award, upon a reference to a private person, was held to bind the title of a party to the submission. If no rent was paid until after 1821, it was, possibly, because all the annuitants were not dead. The defendant is exempted from personal responsibility by the same act, 7 G. 4, c. cxiii. s. 37, which enables parties to sue the trustees in the name of any one of them. In *Gravenor v. Woodhouse* the attornment appears to have been obtained by fraud.

LORD DENMAN, C. J. I have no doubt upon this case. The defendant is clearly liable. The plaintiffs are trustees for special purposes under the will of Lady Cambden; and there is nothing to take the property out of them. Stat. 17 G. 3, c. 64, provides (sect. 3) that, after the moneys borrowed shall be repaid, and the annuitants shall all have died, then the trustees for the charity estates for the time being shall apply

(a) See also *Doe dem. Hobbs v. Cockell*, 4 A. & E. 478.

all the rents thereof to the purposes set forth in the will. How can they do this unless they are to receive them? The language of Lord TENTERDEN, in *Doe dem. Jackson v. Hiley*, 10 B. & C. 893, is certainly very large; but it must be taken with reference to the case then before him, in which the question was, whether the lands could then be considered as belonging to the parish. That case is satisfactorily explained by the fact that no feoffee appeared, nor any other person in whom the legal estate was vested. Stat. 59 G. 3, c. 12, was not intended to strip all trustees of their estates merely because the parish derived some benefit from the trust. I am happy that our judgment will not interfere with the opinion of Lord TENTERDEN.

I also think that the result of the proceeding before the Master of the Rolls was binding, and that the payment of rent since is conclusive under the circumstances.

PATTESON, J. I agree on all the points. As the charity estates are directed by sect. 1 to be let to the highest bidder, I am inclined to think that sect. 21 must apply to other lands, and not to that on which the workhouse is built. But, supposing the trustees for the poor had a right to build on the land, it does not follow that they must not pay a fair rent for it. *Doe dem. Jackson v. Hiley*, 10 B. & C. 893, is an authority where all the trusts are for parish purposes; and it certainly seems to go to the extent of showing that, in such cases, the estate is transferred from the heir of the surviving feoffee to the churchwardens and overseers. It is enough, in the present case, to say that this is a trust for special, and not for general, purposes, and that the land, of which the profits are to be so applied, cannot be called parish property. If it were otherwise, the probable consequence would be that the funds would be mixed up together, and those of the charity misapplied to the purpose of general relief.

As to the other point, the suit was an amicable one, instituted by mutual agreement, and the rent has been since paid in pursuance of the order then given. The parties acquiesced in the order, and paid rent during a long period with a full knowledge of all the facts. It is to be lamented that the trustees for the poor have not been content to abide by the direction of the Court.

WILLIAMS, J. I am of the same opinion. The parish and the charity lands are distinct under the act. That the charity is in some degree in aid of the parish funds cannot make it parish land. In admitting that the charity funds cannot be applied generally to parish purposes, the Attorney-General shows that the land cannot pass to the parish officers under stat. 59 G. 3, c. 12.

As to the payment of rent, the long acquiescence of the parties is as binding and conclusive as any payment of rent can be, being the result of a friendly application to the Master of the Rolls with a view to settle all disputes on this subject.

COLERIDGE, J. The plaintiffs have made out a prima facie case of landlord and tenant, which has not been rebutted by the defendant. The words of sect. 21 of stat. 17 G. 3, c. 64, must be meant to apply to other lands in the parish, and not to those which are strictly Lady Cambden's charity. She never gave lands to the parish, but to certain trustees for certain specified objects. Those objects differ materially from the ordinary objects of parish relief. Even the direction to apprentice children is confined to boys, and therefore cannot, as under the

statute of Elizabeth, be extended to girls. The Cambden charities are clearly distinguished in stat. 17 G. 3, c. 64, from others; and, although their funds are made partially applicable to certain specified parish purposes, yet, when those purposes are fulfilled, the whole revert to the charity trustees, and are then to be solely applied to the objects of the charitable bequest. The cases of *Doe dem. Jackson v. Hiley* and *Doe dem. Higgs v. Terry* do not conflict with the present time. *Doe dem. Jackson v. Hiley* shows only that lands applicable to the purposes of a church rate may be considered as parish lands. In *Doe dem. Higgs v. Terry*, the origin of the charity did not appear, and the land had always been treated and demised as parish land.

Judgment for the plaintiffs.(a)

(a) See *Attorney-General v. Lewin*, 8 Sim. 366; *In re Paddington Charities*, Id. 629; *Ex parte Annesley*, 2 You. & Coll. 350; *Alderman v. Neate*, 4 M. & W. 704; and stat. 5 & 6 W. 4, c. 69, s. 8.

HEYWOOD v. COLLINGE.—p. 268.

An action on the case lies for *maliciously* and without reasonable or probable cause, arresting plaintiff, and detaining him until discharged by a judge's order, pending a former suit by defendant for the same cause of action, in which plaintiff had been arrested and discharged out of custody by reason of defendant's delay in declaring.

To such action it is no defence that the second suit is still pending; and, *semble*, the action lies, although the party arresting had a good cause of action. *Quære*, whether it lies where the defendant obtained a judge's order for the second arrest?

CASE. The declaration stated that defendant had sued a writ of *quo minus* out of the Court of Exchequer against one J. Whylet and plaintiff, indorsed for bail for 244*l.*, and had caused plaintiff to be thereupon arrested and imprisoned for that sum for a long space of time, until plaintiff obtained his discharge out of custody by reason of defendant's not having declared against plaintiff in due time according to the practice of the court; and, whereas defendant could and might, if he had thought fit, have proceeded to and have obtained a judgment of the court in that suit; and the said suit, before and at the time of committing the grievances after mentioned, was pending; yet defendant, well knowing the premises, but contriving to vex and harass the now plaintiff, and to cause him to be again arrested for 230*l.*, part of the said sum of 244*l.* and cause of action for which plaintiff had been before arrested and imprisoned, without the leave of the court or any judge or baron thereof, or the leave of the Court of King's Bench or any judge thereof, and *without any reasonable or probable cause*, wrongfully, vexatiously, *maliciously*, and oppressively caused to be sued out of the Court of King's Bench a *capias* in an action on promises at the suit of defendant against plaintiff, and wrongfully, vexatiously, maliciously, and oppressively caused it to be indorsed for bail for 230*l.*, being part of the said sum of 244*l.* and the same identical cause of action for which the now defendant had caused plaintiff to be before arrested and imprisoned; and wrongfully, vexatiously, *maliciously*, and oppressively caused plaintiff (then being a prisoner) to be detained in custody under the last-mentioned writ for a long space of time, until he was, by a judge's order, discharged out of custody as to the said last-mentioned action; by means whereof &c.

Plea. That "the said writ of capias in the declaration mentioned has not been set aside; and that the defendant has declared thereon in the last-mentioned court; and that the last-mentioned cause of action was, before and at the commencement of this suit, and still is, depending in the said court." Verification.

Demurrer, alleging for cause that the plea neither confessed and avoided nor traversed the cause of action, and that the pendency of the suit in the King's Bench was no answer to the present action. Joinder.

R. V. Richards, for the plaintiff. The action is, in substance, an action for maliciously arresting the plaintiff twice for the same cause. The plea is no answer to this; it only shows that the second action is still pending. In actions for malicious prosecution, or for malicious arrest, it is necessary to aver the determination of the prosecution or suit, because, until then, it does not appear whether the proceeding was groundless or not. Here the plaintiff does not say that there was no cause of action upon the occasion of the second arrest. In effect, he admits a good cause of action against him; but complains that he is maliciously vexed by a second arrest in respect of such cause. *Scheibel v. Fairbairn*, 1 B. & P. 388, is, in principle, an authority for the plaintiff; for, although it was there held that an action would not lie for merely neglecting to countermand a capias after satisfaction of the debt, yet EYRE, C. J., considered that, "had the defendant refused or wilfully neglected to countermand the writ, it might have afforded evidence on an averment of malice by which the action might have been sustained." (a) Here malice is averred throughout. *Page v. Wiple*, 3 East, 314, is to the same effect; and the language of the Court there shows that even mere neglect or non-feasance may be actionable when coupled with vexation and malice. *Crozer v. Pilling*, 4 B. & C. 26, (10 E. C. L. R.,) affirms the same principle. There is no instance in which an action will not lie for a malicious injury. To require that the plaintiff should aver the determination of the second action, might preclude him from suing at all for the injury occasioned by the second arrest; for, if the debt be due, which is not denied, the plaintiff in that action has a right to continue it, and must succeed, although he had no right to make a second arrest. Both the actions may, indeed, be continued, if the defendant in them does not plead *autre action pendent*. In *Grainger v. Hill*, 4 New Ca. 212, (33 E. C. L. R.,) a malicious abuse of the process of the Court by capias was held actionable, without alleging either a termination of the suit or the want of reasonable and probable cause. As there are many cases in which a defendant may be arrested more than once, and a judge, though he may discharge from custody, can give no compensation, it will follow that if this action is not sustainable, a creditor may, with impunity, harass his debtor by repeated arrests until the debt is paid.

W. H. Watson, contra. The declaration is obscure; it is not clear whether the plaintiff complains of the issuing of a second writ without a judge's order, or of the arrest under it without reasonable or probable cause. If the former be the ground, then the declaration does not sufficiently show that no such order was obtained. If the second be the ground, then the determination of the suit must be averred. The declaration is in the usual form of an action for malicious arrest, except that two writs are mentioned instead of one. But, assuming the gravamen to be the arresting a second time without a judge's order, a second arrest was, in many cases, warrantable without such order, before R

III. 2 W. 4, I. 7, (a) *Olmius v. Delany*, 2 Stra. 1216, and non constat that the arrest was not before that rule. Nor is such order always necessary, even since the rule; *Richards v. Stuart*, 10 Bing. 322, (25 E. C. L. R.,) *Cantellow v. Freeman*, 1 C. & M. 536, S. C. 3 Tyrwh. 579. Further, it is consistent with the declaration that an order of a judge of the Common Pleas may have been obtained; and the subsequent discharge out of custody does not show the arrest to have been illegal, for the ground of discharge does not appear. The action is unprecedented; no instance can be shown of an action brought for arresting without an order, although prisoners are often discharged from custody for the want of one. Except where the practice of the Court prevents it, a party has a right to arrest twice for the same debt. The rule K. B. Mich. 15 Car. 2, s. 2, (b) was the first that abridged this right; but the limitation is still mere matter of practice, which cannot be pleaded, (c) and a violation of which cannot be a ground of action. The forms of law may often harass without adequate remedy. Here the proper remedies are to plead the pendency of the former action, and to obtain a discharge by a judge's order; and the payment of costs will be a sufficient indemnity to the injured party. In *Stokes v. White*, 4 Tyr. 786, S. C. 1 C. M. & R. 223, (d) (where *Cameron v. Lightfoot*, 2 W. Bla. 1190, was discussed,) it was doubted whether any action would lie for arresting a privileged person. In *Crozer v. Pilling* there was a tender of the debt and costs by the prisoner; and after such tender and refusal there was no cause of action upon which the creditor had a right to detain.

R. V. Richards, in reply. As to the argument of novelty, *Crozer v. Pilling* and *Grainger v. Hill* were both cases of the first impression; and, although many illegal second arrests may take place, cases of repeated malicious arrest for the same cause are not common. [Lord DENMAN, C. J. Is it sufficiently averred that there was no order?] It matters not whether there was or was not any good cause of action, or any judge's order obtained. Even if the second arrest took place under such order, it was obtained maliciously, and will be no justification in this form of action. The plaintiff in the former action may have wilfully made use of an affidavit full of falsehoods, and so succeeded in getting an order; in such a case is the party arrested to have no compensation? He may have lost a voyage by the second arrest; is he to have no remedy? That the motive in issuing the second capias was malicious is admitted by the demurrer. Costs are no compensation for loss of liberty, but only for the charges of the action or proceeding. If there had been good ground for the second arrest, (as in *Cantellow v. Freeman*, where there was a breach of faith,) this would have been evidence to rebut the allegation of malice; but no such ground can be found or implied here. It rather appears to be a case in which a second arrest would not be allowed. *Cameron v. Lightfoot* shows only that trespass is not the proper form of remedy; but the judgment of the Court in that case is in support of the present action. As to the allegation of a want of reasonable and probable cause, it is wholly immaterial; for the law will not permit repeated arrests to be made maliciously and without cause, even where there may be a good ground of action.

(a) 3 B. & Ad. 875, (28 E. C. L. R.)

(b) See note (a) to *Quin v. Reynolds*, 3 M. & S. 144, (80 E. C. L. R.,) *Peacock's Rules*, K. B. p. 54.

(c) See *Sandon v. Prector*, 7 B. & C. 800, (14 E. C. L. R.)

(d) See *Wise v. Carrow*, 4 M. & W. 522.

LORD DENMAN, C. J.—The defendant, in his plea, treats the action as a common one for a malicious arrest without probable cause. If it were so, it would be bad for want of an averment that the suit was determined. But it is contended for the plaintiff that this is an action for a malicious abuse of the process of the court by a second arrest for the same cause. I am unwilling to hold that the action is maintainable; for the defendant in arresting under a second writ does not necessarily appear to have done anything which he might not lawfully do, nor does the plaintiff appear to have suffered any damage in consequence of the second arrest. If, indeed, the plaintiff had shown in his declaration that the defendant arrested him a second time from motives merely vexatious, and without any reasonable expectation of advantage to himself from such arrest, it might have been different. However, the court must here assume the arrest to have been malicious; and perhaps the words "without reasonable or probable cause" may be taken to mean that the defendant knew he had no ground for the second arrest, and could derive no advantage from it. On the whole, therefore, the declaration, not having been specially demurred to, may be supported.

PATTESON, J.—This is not a case in which the mere practice of the court has been made the ground of action; otherwise the declaration would have been bad: in its present form I think it is good upon general demurrer.

WILLIAMS, J.—The defendant should have demurred specially to the declaration.

COLERIDGE, J.—Any objection to defect of form in the declaration is, of course, not available on this record. Now, at all events, it states a malicious detention of the plaintiff in custody upon a second arrest for the same cause of action in respect of which he had been duly discharged out of custody upon the first. If an action is not sustainable under such circumstances, we must be prepared to hold that the process of the court may be abused by a plaintiff for purposes however wanton and malicious. We may suppose the case of a party harassing the defendant under the forms of law by maliciously suing out three writs for the same cause on the same day, and successively arresting the defendant on all three of them. In such a case, the principle of the law allows an action, although in form it may have some novelty.

S.

Judgment for the plaintiff. (a)

(a) See *Saxon v. Castle*, 6 A. & E. 652; (33 Eng. Com. Law Reps. 161;) and the dictum of Lord Ellenborough, C. J. in *Quin v. Reynolds*, 3 M. & S. 144, 145.

BARTRUM, Public Officer, &c. against CADDY.—p. 275.

A note payable to A. or order on demand cannot be reissued after payment by the maker.

In an action by the holder against the payee of such a note for 200*l.*, the plea averred that the defendant indorsed it at the request and for the accommodation of the maker, for the sole purpose of depositing it with B. as security for a debt of 200*l.* due from the maker to B.; that the maker afterwards paid the debt to B., who thereupon redelivered the note to the maker: Held, on general demurrer, that the above statement was in effect an averment that the note had been paid by the maker: and therefore that the plea disclosed a sufficient defence.

Quære, whether the indorsee of an overdue note, payable on demand, be affected by its previous equities, unless he had notice that it was overdue?

ASSUMPSIT on a promissory note, by a banking copartnership suing in the name of their public officer under stat. 7 G. 4, c. 46. The declaration stated that J. Hatherley and J. Hamlyn made their joint and several promissory note for 200*l.*, payable to defendant or order on demand, and averred indorsement by defendant to the company, presentment to, and nonpayment by, the makers, and notice to defendant.

Plea 1. That, at the time of making the note, Hatherley and Hamlyn were jointly indebted to one Bartlett in 200*l.*, for which he required a security; that defendant thereupon, at their request, indorsed in blank the note mentioned in the declaration for their accommodation, and delivered it to them for the purpose of depositing it with Bartlett as such security, and to and for no other intent or purpose whatever: that the note was accordingly delivered for that purpose to Bartlett: that Hatherley and Hamlyn afterwards "paid to the said Bartlett the said debt," and Bartlett "thereupon redelivered to them the said note:" and that afterwards, and more than two years from the date thereof, Hamlyn delivered it to plaintiffs to secure a debt due from himself alone to plaintiffs without defendant's authority.

Plea 2, resembled the first plea, except that, after stating payment of the debt, and redelivery of the note to Hatherley and Hamlyn, it further averred that, although neither of them had any authority from defendant to negotiate the note after the redelivery thereof as aforesaid, yet Hamlyn, two years after the date thereof, wrongfully and in fraud of defendant, delivered the note to plaintiffs to secure a debt from him to plaintiffs; and that plaintiffs, "having received the same from Hamlyn on his own private account, and at a period so long after the date thereof as before alleged, acted negligently, and did not use due and ordinary caution in so taking it."

General demurrer to both pleas.

Crouder, for the plaintiffs. No defence is shown by the facts stated in either of the pleas. The plaintiffs as bona fide holders for value were not affected by the fraud of Hamlyn, of which it is not averred that they had notice. The note being endorsed generally, it was the business of the defendant to stop its circulation; and the fact of payment and redelivery to Hatherley and Hamlyn, without the plaintiffs' knowledge, makes no difference. The length of time elapsed before it was re-issued might be evidence of laches, but is not, in itself, a legal defence. The doctrine first introduced in *Gill v. Cubitt*, 3 B. & C. 466, (10 E. C. L. R.), and recognised in several succeeding cases, and which is evidently relied upon in the second plea, cannot be supported, and has been shaken by more recent decisions: *Crook v. Jadis*, 5 B. & Ad. 909, (27 E. C. L. R.), *Backhouse v. Harrison*, 5 B. & Ad. 1098, *Foster v. Pearson*, 1 C. M. & R. 849, S. C. 5 Tyrwh. 255, and *Goodman v. Harvey*, 4 A. & E. 870, (31 E. C. L. R.).

Erle, contra. There are other objections to the plaintiffs' recovery than those which have been adverted to. 1. This is a satisfied note, and therefore not capable of being re-issued. The defendant, by indorsing the note, promises to pay in default of the makers. Here the whole of the sum of 200*l.* for which the note was given, has been paid, and the note returned into the hands of the original makers; the obligation of the defendant is therefore at an end, and it cannot be re-issued so as to charge him. *Freakley v. Fox*, 9 B. & C. 130, (17 E. C. L. R.), is in point, and is a stronger case than the present, for that was an

action against the maker. There the payee and holder had appointed the maker to be his executor, and, because this was, in its operation, a discharge of the note by the maker, it was held to be no longer capable of being indorsed by him as executor. The same doctrine is supported by *Beck v. Robley*, 1 H. Bl. 89, note (a), *Thorogood v. Clarke*, 2 Stark. N. P. C., (3 E. C. L. R.,) and *Burbridge v. Manners*, 3 Camp. 194. In *Gomez Serra v. Berkley*, 1 Wils. 46, the note had never been paid by the maker. *Callow v. Lawrence*, 3 M. & S. 95, (30 E. C. L. R.,) shows only that the acceptor continues liable till payment *by him*. This is the common case of a note given in payment for goods sold; when the goods are paid for and the note given up, the obligations upon the note are extinguished. But independently of the common law, the re-issuing of a note of this kind is expressly prohibited by the Stamp Act, 55 G. 3, c. 184; (a) and sect. 19 vacates and discharges notes so re-issued. 2. This is an overdue note, and must, therefore, be taken subject to all equities. The note was endorsed as a security only, and for the maker's accommodation; and a note payable on demand is overdue, at least as soon as there has been a demand or presentment to the maker; *Barrough v. White*, 4 B. & C. 325, (10 E. C. L. R.) The pleas show that it came back into the hands of the maker, which is equivalent to a demand and is proof of it. [PATTESON, J. It is not averred in the plea that the plaintiffs had notice that it was overdue.] The party who takes an overdue bill is liable to equities without proof of notice. [Lord DENMAN, C. J. It usually appears on the face of it to be overdue. PATTESON, J. Surely the plaintiffs must be fixed with a knowledge that the note had been presented, so as to be overdue?] *Banks v. Colwell*, cited in *Brown v. Davis*, 8 T. R. 81, and *Norton v. Ellam*, 2 M. & W. 461, show that a note payable on demand may be considered as due immediately. 3. A bygone debt is not a sufficient consideration to give a person, claiming under a fraudulent assignment, a title to recover. 4. Unless the Court overrules the cases founded on the doctrine in *Gill v. Cubitt*, 3 B. & C. 466, (10 E. C. L. R.,) there must be judgment for the defendant on the second plea.

Crowder, in reply. On the first point the pleas do not distinctly aver that the note was paid; they only state that the debt was paid, and note redelivered. The facts alleged may be evidence of payment, and might be properly submitted as such to a jury, but they are not in themselves equivalent to payment. The cases cited are all cases of payment by parties primarily liable on notes payable at a fixed time. *Roberts v. Eden*, 1 B. & P. 398, shows that a note may pass backwards and forwards between the parties to it, and be successively re-issued without affecting the liability of the maker. [PATTESON, J. There it passed between payee and endorsee, and was never paid by the party originally liable.] The payment of the debt here may, or may not, have amounted to a satisfaction of the note. It may have been given to secure a fluctuating balance. Suppose the note differed in amount from the debt, as 250*l.* instead of 200*l.*: then as to 200*l.* the transaction might amount to payment; but as to the residue the note would be unsatisfied, and therefore re-issuable. The accidental coincidence between the amount of the note and the debt can make no difference. It may have been re-de-

(a) Schedule, Part 1, title *Promissory Note*, Class 2. *Moyser v. Whitaker*, 9 B. & C. 409, (17 E. C. L. R.,) shows that such a note is within the second class, and therefore not re-issuable.

livered, yet not paid. The payment of it is mere matter of inference, and ought to have been directly stated, so as to enable the plaintiffs to take issue on it. *Freakley v. Fox*, 9 B. & C. 130, (17 E. C. L. R.,) is the only material case cited on this point on the other side, and that in fact only decided that the executorship of the maker was tantamount to payment. [On the other points he was stopped by the Court.]

LORD DENMAN, C. J.—We are satisfied upon the first point. The object of the parties in the second plea was probably to have the opinion of the court on the doctrine held in *Gill v. Cubitt*, 3 B. & C. 466; (10 Eng. Com. Law Reps. 154,) which has been more than questioned. On this we shall be prepared to decide when necessary. It is sufficient for the present case to say that the sum for which this note was given has been paid, and the bill re-delivered. Then the act of parliament, 55 G. 3, c. 184, s. 19, applies, and prohibits the re-issuing of it. *Freakley v. Fox*, 9 B. & C. 130; (17 Eng. Com. Law Reps. 342,) also assumes the same doctrine.

PATTESON, J.—The question whether the payment of the debt and redelivery of the note would or would not, under certain circumstances, amount to repayment, does not arise here. The note appears to have been made by Hatherley and Hamlyn, indorsed by the defendant, and delivered to them for the purpose of depositing it with Bartlett as a security for his debt, “and to and for no other intent or purpose whatever.” The pleas aver payment of the debt, being the precise amount of the note, by the persons primarily liable on the note. This seems to be a payment of the specific sum due on the note. If so, it is immaterial whether Hamlyn issued it on his private account or not. Then after such payment the act 55 G. 3, c. 184, s. 19, distinctly prohibits the re-issuing. *Freakley v. Fox*, 9 B. & C. 130; (17 Eng. Com. Law Reps. 342,) seems to take for granted the same law. LORD TENTERDEN there says, “It is contended that by the appointment of the maker to the office of executor the note was discharged, so that an indorsement, even by the debtor himself, could not set it up and make it a binding instrument; and we are of that opinion.” (9 B. & C. 133; 17 Eng. Com. Law Reps. 342.) In that case, the payee or his executors might have indorsed and re-issued the note according to the doctrine contended for by the plaintiffs in this case. *Beck v. Robley*, 1 H. Bl. 89, note *a*, and *Thorogood v. Clarke*, 2 Stark. N. P. C. 251; (3 Eng. Com. Law Reps. 337,) are also in point. In *Roberts v. Eden*, 1 B. & P. 398, the note was never in fact in the hands of Eden, the maker, though all accounts were settled between him and the payee: it was then outstanding in the hands of an indorsee. Here the note had returned into the hands of the makers, and neither of them had any power to put it in circulation again.

WILLIAMS, J.—It is admitted on behalf of the plaintiffs that payment would put an end to the bill, but it is contended that nothing but the very word *payment* will suffice in pleading. This is substantially an allegation of payment, and sufficient, at least on general demurrer. The plea states payment of the precise sum secured by the note, and redelivery of the note thereupon.

COLERIDGE, J.—The only question is, do the first and second pleas disclose payment, however informally? If the statement had been that Hatherley and Hamlyn had given the note for goods sold, and that the goods were afterwards paid for by them, and the note redelivered to them, there could have been little doubt on general demurrer, that this

would have sufficiently averred payment and satisfaction of the note. The difficulty here arises from this being the case of an antecedent debt, and a note given as a security for it. It was however given to cover the specific debt mentioned in the plea, and "for no other purpose." Cases have been ingeniously put of a bill or note given as a security for a debt of varying amount, or for a fluctuating balance, it is sufficient to say that such is not the case here. If then it appears that the note has been satisfied by the makers, the statute dispenses with any notice, and the instrument becomes waste paper.

S.

Judgment for the defendant.

GOMPERTZ against LEVY.—p. 282.

A declaration for libel alleged, without any material introductory averment, that defendant published of and concerning plaintiff the false, scandalous, and defamatory libel following, viz: "Notice—any person giving information where any property may be found belonging to H. G. (meaning the plaintiff,) a prisoner in the King's Bench prison, but residing within the rules thereof, shall receive 5 per cent. upon the goods recovered, for their trouble, by applying at Mr. L." &c. (meaning the defendant, and meaning that the plaintiff had been and was guilty of concealing his property with a fraudulent and unlawful intention.) Held, on general demurrer, that the innuendo, unsupported by any prefatory averment was too large; and that the words, in themselves, were not actionable.

CASE for libel. The declaration, after the usual introductory averments of good character, stated that defendant maliciously intending to injure and disgrace plaintiff, and to cause it to be suspected that he had been guilty of the misconduct thereafter imputed to him, falsely and maliciously published of and concerning plaintiff a false, scandalous, and defamatory libel, containing the false, scandalous, and defamatory matter following of and concerning plaintiff, that is to say, "Notice—any person giving information where any property may be found belonging to Henry Gompertz (meaning the plaintiff,) a prisoner in the King's Bench prison, but residing within the rules thereof, at 3, 4, and 5, Portland Place, Borough Road, shall receive 5 per cent. upon the goods recovered, for their trouble, by applying at Mr. Levy, Fetter Lane, Fleet Street," (thereby then meaning the defendant, and also thereby then meaning that the plaintiff had been and was guilty of concealing his property with a fraudulent and unlawful intention.) By means whereof, &c.

The plea stated several judgments recovered by defendant against plaintiff, and writs of execution issued; that plaintiff was living in apparent affluence a prisoner within the rules of the King's Bench prison, yet the sheriff was unable to find any goods of plaintiff whereon to levy; wherefore defendant, being desirous to obtain information, and in order to discover property of the plaintiff, so that the sheriff might execute the writs, &c., published, &c., as he lawfully might; the said matter being published bona fide for the purpose of obtaining such information aforesaid for the purpose aforesaid: which are the same, &c. Verification.

Replication. That the judgments were entered up against plaintiff upon warrants of attorney given by plaintiff to defendant: that, after the said recoveries, and after the issuing of the said writs of execution, plaintiff exhibited a bill in the exchequer against defendant, complaining that the warrants of attorney had been obtained from plaintiff, as the truth was, fraudulently and without any consideration, and praying an injunction to restrain any further proceeding, or other action, in respect of the said warrants: that an injunction was accordingly issued, commanding

defendant not to prosecute any action, or enter up any judgment, or sue out or levy any execution against plaintiff, but to desist from further proceedings until defendant should answer the bill: that defendant had not answered the bill, and that the injunction was still in force. Verification. General demurrer.

Hoggins, for the defendant. The replication is no answer to the plea, but admits that the notice was published bona fide for the purpose of obtaining information as to plaintiff's property. The notice is, in fact, no libel at all, but an advertisement which the plaintiff himself may have issued for his own benefit. *Stockley v. Clement*, 4 Bing. 162, (13 E. C. L. R.,) is a similar case.

Butt, contra. The notice, as explained by the innuendo, is a libel. Whether it admits of the meaning assigned to it or not, is a question for the jury. In *Stockley v. Clement* there was no innuendo; an omission which was adverted to by the Court in that case. Here the innuendo is, that the plaintiff had secreted his property; and the words may fairly be construed to convey that imputation. In *Stockley v. Clement* only the general issue was pleaded; here there is a special plea, which, in effect, admits the meaning attributed to the libel. [Lord DENMAN, C. J. You call the words scandalous and defamatory; should you not state facts to show how they are so?] These words are not traversable, therefore particularity of statement is not required. *Brown v. Croome*, 2 Stark. N. P. Ca. 297, (3 E. C. L. R.,) shows that an advertisement like this is a libel, even where the avowed object of it may be legitimate; and in that case, also, there was nothing in the advertisement itself necessarily disparaging to the plaintiff. If, as is contended, the notice was published with the plaintiff's authority, the plea should show it. Even rejecting the innuendo, and taking the words as a mere statement that the plaintiff is a prisoner for debt in the King's Bench prison, they are libellous, for they tend to disparage and bring him into disrepute. They impute to him, in substance, either that he has dishonestly refused to pay his debts, or that he has dishonestly incurred debts which he cannot pay. It is like advertising a man to be a swindler, which, if in print, would be a libel.

Lord DENMAN, C. J.—This is no libel. It might be one if additional facts and circumstances had been stated showing the situation of the defendant, so as to warrant the innuendo. Here the innuendo attempts to give to the words an import which they do not necessarily bear.

PATTESON, J.—*Goldstein v. Foss*, 4 Bing. 489, (15 Eng. Com. Law Reps. 53,) shows that an innuendo cannot be used to enlarge the meaning of words without prefatory averments. The declaration does not even state that the words were spoken of and concerning property of the plaintiff supposed to have been concealed by him.

WILLIAMS, J.—The innuendo is too large. It is like the case in which "my barn" was alleged, by innuendo, to mean "my barn full of corn." (*Barham's case*, 4 Co. 20 a.) The rule is clearly laid down in *Rex v. Horne*, Cowp. 672; (and see note (4) to *Craft v. Boite*, 1 Saund. 242; and *Day v. Robinson*, 1 A. & E. 554; 28 Eng. Com. Law Reps. 151.)

COLERIDGE, J.—Without the innuendo, the words only import that the plaintiff is a prisoner for debt. This is not, of necessity, a libel, nor does the addition of the innuendo make it one. An innuendo will not serve without introductory averments, unless there be a natural connection between the words and the meaning assigned to them; otherwise, to say

of a man that "he is gone to America," might be made a libel by adding an innuendo that he did so to avoid paying his creditors.

S.

Judgment for the defendant.(a)

(a) The following case was argued and decided in last Michaelmas term.

WHEELER against HAYNES.—p. 286.

Declaration for slander stated that, at the time of the speaking, &c., plaintiff worked for and was employed by one B. Glass in his barn, in and about thrashing Glass's corn, and that defendant, intending to cause it to be believed that plaintiff had been guilty of felony, falsely and maliciously spoke of and concerning plaintiff the words, "I saw J. G. coming across Mr. Glass's barn with some barley, and my son said 'What art going to do with that?'" J. G. said he was going to feed pheasants with it, and said, where he had that he could have more, and that he had it at farmer Glass's barn (meaning the said barn belonging to the said B. Glass, wherein the plaintiff was so at work and employed as aforesaid, and that the barley so alleged by defendant to have been in the possession of J. G. was the property of the said B. Glass, and that plaintiff had stolen the same from the said B. Glass, and given the same to the said J. G.). Averment of special damage.

Held *habeas*. The innuendo not being borne out by the other parts of the count. And that a demurrer to such count did not imply any admission by which the defect could be aided.

SLANDER. The declaration stated that plaintiff, until, &c., had never been guilty or suspected to have been guilty of felony or theft; that, before and at the time when, &c., he had been and was in the service and employment of Benjamin Glass, as a labourer, and in that capacity had always behaved honestly, &c.; and that plaintiff and one Hugh Hill, at the time of the committing of the grievance, were at work for, and employed by, the said B. G., in a certain barn belonging to the said B. G., in and about the thrashing certain corn there of the said B. G.; yet defendant, well knowing, &c., but contriving, &c., and to cause it to be suspected, &c., that plaintiff had been guilty of felony, and to subject him to the pains and penalties, &c., on, &c., in a certain discourse which defendant then had of and concerning plaintiff in the presence and hearing, &c., then, in the presence and hearing, &c., falsely and maliciously spoke and published of and concerning plaintiff these false, &c. (that is to say): "I (meaning himself the said defendant) saw one John Gay coming across Mr. Glass's barn with some barley, and my (meaning his the said defendant's) son Henry Haynes said, 'What art going to do with that?' Gay said he was going to feed pheasants with it (meaning the said barley); and said, where he had that he could have more, and that he had it (meaning the said barley) at farmer Glass's barn (meaning the said barn belonging to the said Benjamin Glass, wherein the plaintiff was so at work and employed as aforesaid, and thereby also meaning that the said barley so alleged by the defendant to have been in the possession of the said John Gay was the property of the said Benjamin Glass, and that the plaintiff had stolen the same from the said Benjamin Glass, and given the same to the said John Gay)." By means whereof plaintiff hath been injured, &c., and divers persons have believed him to have been guilty of felony, &c. It was also averred that, by reason of the slander, Glass dismissed plaintiff from his employment. General demurrer. The principal ground stated in the margin of the paper-book was, that the innuendo alleging that the words charged plaintiff with having stolen barley from Benjamin Glass was not warranted by the words set out, nor supported by any inducement or previous statement to which it could refer. It was also objected that the words were not alleged to have been spoken concerning plaintiff's employment by, and working for, Glass in the barn, &c. Joinder in demurrer. The Court called upon

Bevan to support the declaration. The demurrer admits the fact alleged in the innuendo, that the words were spoken with a certain intent; the only question remaining is, whether they will admit of, not whether they must necessarily receive, the construction given to them. In 1 Starkie on Libel, 87 (2d ed.), it is said to be "of no importance whether the terms used be doubtful, or even apparently innocent, provided it can be shown that they could and did convey the offensive meaning which forms the ground of complaint." Here that would have been for the jury on a trial; and, if the jury had found a verdict for the plaintiff, it is clear, from the dicta of the Judges in *Sweetapple v. Jesse*, 5 B. & Ad. 27, that the Court, on motion in arrest of judgment, would have been bound to presume all facts proved which were necessary to support the declaration. [Lord DENMAN, C. J. Is any fact stated in this declaration which could warrant the jury in finding that words imputing felony were spoken?] The plaintiff would have to prove on the trial that that imputation was conveyed. The innuendo here is legitimate according to the office of an innuendo, as described in note (n) to Com. Dig., Action upon the case for defamation (G. 10), 5th (Hammond's) ed. In *Mountney v. Watton*, 2 B. & Ad. 673, where the justification was held insufficient, the words of the alleged libel, so far as they were justified, did not conclusively infer a charge of horse stealing; and Lord Tenterden said, "If the words of the alleged libel did not amount to a charge of felony, the defendant, on a trial, would have succeeded upon the general issue." The question, therefore, as in the present case, would have been for the jury. Besides, the declaration here clearly shows that a special damage, namely the dismissal of the plaintiff from Glass's service, resulted from the words used; and that will sustain the action, according to the doctrine laid down, particularly by Parke and Patteson, Js., in *Knight v. Gibbs*, 1 A. & E. 43. [Lord DENMAN, C. J. There it was argued that, because the party to whom the slanderous words were addressed did not believe them, the injury did not result from them; but the facts showed that it did. The former part of your argument would go to the extent that, if a man said, such a one walked out of the Court of Queen's Bench, it might be a question for a jury whether the speaker did not mean that the party had committed felony there.] In this case the demurrer admits the sense in which the words are said to have been spoken. [Lord DENMAN, C. J. The demurrer means that the plaintiff has given no premises from which the suggested inference would arise.] In *Digby v. Thompson*, 4 B. & Ad. 821, it was argued, and not denied by the Court, that a demurrer admits the intent charged by an innuendo. [Lord DENMAN, C. J. I confess I cannot quite see that. And the decision there is applicable to a case of libel, not words.]

Kelly, contra, was not heard.

Per Curiam (Lord Denman, C. J., Patteson, Williams, and Coleridge, Js.)

Judgment for the defendant.

PITCHER against KING.—p. 288.

No action lies against the sheriff for a false return of nulla bona by his bailiff to a writ of fi. fa. issued out of his county court, although it be alleged in the declaration that defendant had notice of the goods, and that the return was made with his privity and by his direction.

To an action for a false return to a writ of fi. fa. on a judgment in the court of K. B., it is no plea that the plaintiff, after the return of the writ, brought an action of debt on the judgment, and obtained a second judgment thereon.

CASE for false return by the sheriff of Sussex. The first count stated a recovery by plaintiff against one Bean in the county court of Sussex, and a writ of fi. fa. issued by defendant, then being sheriff, to his bailiff, to levy the debt and costs: that, although there were goods of the said Bean in defendant's bailiwick, whereon defendant and his bailiff might have levied, whereof defendant and his bailiff had notice, yet neither defendant nor his bailiff levied the moneys; and the said bailiff, "with the privity and by the direction of the defendant as such sheriff," falsely returned to defendant that the said Bean had no goods within his bailiwick.

The second count stated a judgment recovered in the Court of King's Bench, and a writ of fi. fa. issued against the same Bean, under which defendant had seized his goods and levied part of the moneys, but falsely returned that the goods remained unsold for want of buyers.

Plea to the first count. That, after the return of the writ therein mentioned, and before the commencement of this suit, plaintiff brought an action of debt in the Court of King's Bench on the judgment in the county court, and recovered a judgment in the said Court of K. B., by means whereof the judgment in the county court was merged in the judgment so recovered in the Court of K. B., and satisfied; and plaintiff thereby waived his said writ of fi. fa., and released and discharged defendant from the premises. Verification.

The plea to the second count stated, in nearly the same terms, a similar judgment recovered in an action on the judgment in the court of K. B. mentioned in the second count, "by means whereof the judgment in the second count mentioned became and was merged in the last-mentioned judgment, and was and is satisfied in law, and the plaintiff thereby waived and abandoned his writ of fi. fa., and all benefit therefrom, and released and discharged the now defendant from the premises."

Special demurrer to each plea.

Channell, for the plaintiff. The question upon the pleas is, whether the second recovery in this Court merges or satisfies either the judgment in the county court, or the previous judgment in this Court. It is no bar to the action either in respect of the first or the second count. The plea does not deny the wrongful act of the defendant, nor show anything to deprive the plaintiff of his vested right of action. That right cannot be defeated by matter ex post facto between the plaintiff and a third party, not producing satisfaction. *Wordall v. Smith*, 1 Camp. 332, is stronger than this case; for there the plaintiff had actually taken his debtor in execution before he sued the sheriff. In *Godsall v. Boldero*, 9 East, 72, the action was on a contract of indemnity, and therefore stands on a different principle. *Yates v. Whyte*, 4 New Ca. 272, (33 E. C. L. R.,) *Willoughby v. Backhouse*, 2 B. & C. 821, (9 E. C. L. R.,) and *Sels v. Hoare*, 1 Bing. 401, (8 E. C. L. R.,) are in point.

It will be contended that the first count is bad, the sheriff in his county court being a judicial and not a ministerial officer, and, therefore, not liable for the acts of his bailiff, and *Holroyd v. Breare*, 2 B. & Ald. 478, *Tunno v. Morris*, 2 C. M. & R. 298, S. C. 5 Tyr. 949, and *Tinsley v. Nassau*, Moo. & Mal. 52, (22 E. C. L. R.,) will be relied on: but the form of the count here is material; for the false return of the bailiff is alleged to have been made "with the privity and by the direction" of the defendant, who is also shown to have had notice of the goods. This distinguishes the case from others.

Platt, contra, was desired by the Court to confine himself to the point upon the second count. The plea to the second count is good. The plaintiff has no right to a double remedy. The principle of transit in rem judicatam applies. Where there has been a judgment on a bond or recognisance, that judgment is an answer to any further proceeding on the bond or the recognisance; so, where there is a judgment in an action of debt upon a judgment, the first judgment can be no longer enforced, otherwise the plaintiff might now bring a third action upon the first judgment. Debt will not lie on a judgment after execution sued out, "for the plaintiff has chosen another remedy;" Com. Dig. *Debt*, (A.) 2. So here the plaintiff has released and abandoned all advantage from the first judgment by his recovery in the second action. The plaintiff should have sued out a venditioni exponas, and so compelled the defendant to levy upon the writ. *Wordall v. Smith*, 1 Camp. 332, is founded on no intelligible principle, and is the only case in favour of the plaintiff's argument. If the plaintiff may recover in this action, he may also get execution on his last judgment, and so have a double satisfaction. Perhaps this Court might interfere; but the exercise of such equitable jurisdiction can make no difference as to the legal rights of the parties, nor affect the argument as founded on them.

LORD DENMAN, C. J.—We think the first count is bad, and the plea no answer to the second.

PATTESON, WILLIAMS, and COLERIDGE, Js. concurred. Judgment for the defendant on the first count; for the plaintiff on the second.

S.

DANGERFIELD against THOMAS.—p. 292.

Debt on bond. Plea: bankruptcy of plaintiff, fiat, &c., concluding that, "by reason of the premises, the assignees became entitled to the debt and cause of action: Held, that the latter allegation was not traversable.

The replication stated that plaintiff had, by indenture before his bankruptcy, assigned the bond to G. and E. as a security for a larger debt, and that the action was prosecuted for their benefit: Held, that no profit of the indenture was necessary.

A money bond, assigned by the obligee to creditors to secure a debt of larger amount, does not pass to assignees under a fiat against him, although the assignment is expressed to be "for further security," and contains a proviso to defeat it on payment of the debt.

DEBT on bond in the penal sum of 1250*l*.

Plea. That plaintiff, being a trader within the provisions of the bankrupt act, had become bankrupt; that a fiat issued against him; that he was duly declared a bankrupt, and J. and K. were appointed assignees; "by reason of which premises, and by force of the statute, the said J. and K. became and were assignees of the estate and effects

of the plaintiff, and entitled to the said debt or sum and cause of action in the declaration mentioned."

Replication. That, before plaintiff became bankrupt, and before the issuing of the fiat, by a certain indenture between plaintiff of the one part, and J. Gardiner and M. Elgie of the other,—reciting that plaintiff was indebted to the said J. G. and M. E. in the sum 1580*l.*, exclusive of costs, as appeared by a cognovit under the hand of plaintiff, and in a further sum of 80*l.* for certain costs and charges, making together the sum of 1660*l.*, and reciting that defendant had become bound to plaintiff in the penal sum of 1250*l.* conditioned for payment to plaintiff of 625*l.*, with lawful interest (meaning thereby the said bond in the declaration mentioned), and reciting the inability of plaintiff to pay the said sum of 1660*l.*, and the agreement of plaintiff to assign to the said J. G. and M. E., and of the said J. G. and M. E. to accept, the said bond "as a further security" for the debt due to them,—plaintiff in pursuance thereof assigned to the said J. G. and M. E. the said bond, with all principal and interest due, or to be due, thereon, and all the benefit and advantage thereof to be made or obtained by means thereof, or by any process or execution thereupon sued out or executed, and all right, title, &c., of plaintiff to the said bond and moneys, and all powers and remedies for recovering the same to their own use and benefit, subject nevertheless to the proviso that, if plaintiff should pay to J. G. and M. E. the said sum of 1660*l.*, with interest, on a day therein named (a), the indenture should be void. That plaintiff, by the said indenture, appointed the said J. G. and M. E. his lawful attorneys irrevocably in his name, but for their own sole use and benefit, to sue for and recover from defendant the said sum of 620*l.* and interest, when the same became due on the said bond, &c., "as by the said indenture of assignment, reference being thereto had, will more fully appear;" whereof defendant, before plaintiff became bankrupt, and before the issuing of the fiat, had notice. The replication further averred that plaintiff, at the time of making the said indenture, was justly indebted to the said J. G. and M. E. as therein alleged, and that he did not pay them the said sum of 1660*l.* on the day named, nor at any other time, and that there was and still is due to them, on account of the said 1660*l.*, a large sum, to wit 800*l.*, which greatly exceeds the amount due upon and by virtue of the bond mentioned in the declaration; that the action was commenced and is prosecuted, in the name of plaintiff, for the sole use and benefit, and at the instance, of J. G. and M. E., and for the purpose of enabling them to recover the money due on the said bond in part satisfaction of the debt so due from plaintiff, according to the form and effect of the indenture of assignment, and not for the use or benefit of plaintiff, or his said assignees or creditors under the fiat. Verification.

Demurrer, assigning, for causes, the want of profert, or excuse of profert, of the indenture of assignment; that the replication neither confessed and avoided nor traversed the matters in the plea, but left it uncertain whether the plaintiff admitted or denied that the bond debt passed to the assignees of the bankrupt; that it attempted to put in issue matter of inference and law, viz., whether the debt became vested in the assignees by the bankruptcy, admitting the facts stated in the plea; and was argumentative, &c. Joinder.

(a) This was the 1st March, 1836. It was not shown whether this was before or after the bankruptcy. The dates of the fiat and adjudication were stated under *videlicet*.

Swann, in support of the demurrer. 1. The plea concludes by stating that the cause of action became vested in the assignees under the fiat. This is intended to be denied by the plaintiff, and should therefore have been traversed. On the replication, as the plaintiff has framed it, the defendant can take issue only on one point. All the facts taken together amount only to an argumentative traverse. 2. There should be a profert of the deed of assignment to the two creditors Gardiner and Elgie. The plaintiff, in fact, relies upon, and justifies under the parties to, that deed, and is therefore bound to produce it; Com. Dig. *Pleader* (O. 6.) He is identified in interest with them, and could not maintain his replication without the deed. It is in their possession, and they are the real plaintiffs, for whose benefit the action is brought. It is not mere inducement, but the foundation of his title, as stated in the replication. 3. The replication is bad on general demurrer; for this is not an absolute assignment of the debt, but only a mortgage of it with a proviso of redemption. Therefore some beneficial interest remained in the bankrupt, and passed to his assignees under the fiat, for he might have filed a bill to redeem the security. In *Carvalho v. Burn*, 4 B. & Ad. 393, (24 E. C. L. R.,) (a), LITLEDALE, J., states the rule to be, that, "if, at the time of the bankruptcy, the bankrupt possessed the possibility of interest from which a benefit to his creditors might result; if he had the legal interest in any property, and was uncertain whether he would hold any part of it, or, if any, what part, as trustee for others; the whole would pass by the assignment." *Carpenter v. Marnell*, 3 B. & P. 40, is to the same effect. There should be an averment that no interest whatever could or did pass to the assignees. Besides, the assignment is made only as a "further security," so that there may be other securities in the hands of the assignees of the bond, which can therefore only be made to contribute rateably with the rest. In *Leslie v. Guthrie*, 1 New Ca. 697, (27 E. C. L. R.,) the assignment was absolute, and not merely by way of mortgage; and in *Winch v. Keeley*, 1 T. R. 619, though there was a proviso of a similar kind, the point was not made.

R. V. Richards, contra, was stopped by the Court as to the first point. As to the want of profert, this is not a deed under which the plaintiff claims at all; he has no right to the possession of it. He only pleads it to rebut the general assignment under the bankruptcy. The bond, and not the assignment of it, is his title. The general exceptions to the necessity of profert are stated in the notes to *Jevens v. Harridge*, 1 Wms. Saund. 9, 5th ed. Here the deed is mere inducement, and shows no legal interest whatever. [Lord DENMAN, C. J. We think your answer sufficient on this point.] As to the third point, if, in *Winch v. Keeley*, 1 T. R. 619, no such point was made, it must be inferred that the point was not considered tenable. That case is an authority, though it has not been supported to its full extent. *Dean v. James*, 1 A. & E. 809, (28 E. C. L. R.,) (b) shows that notice to the defendant was necessary, which is here averred. It is admitted that there was a just debt; that it exceeds the amount of the bond; and that it was not paid on the day named in the deed. The assignees, therefore, can have no interest in it, unless they redeem it by paying more than its value.

Swann, in reply. As to profert, it is immaterial that the deed passes

(a) Affirmed on error, *Burn v. Carvalho*, 1 A. & E. 883, (28 E. C. L. R.)

(b) And see *Buck v. Lee*, Ibid. 804.

no legal interest, for proferet must be made even of a deed of attornment when a deed is necessary; Com. Dig. *Pleader* (O 7.) Nor is it mere, inducement, but the very ground of the replication.

LORD DENMAN, C. J.—The plaintiff is entitled to judgment. The first objection has no foundation. The replication confesses the facts in the plea, but shows that all interest in the bond had been made over to the two assignees, Gardiner and Elgie. To traverse the conclusion of the plea would be to traverse mere matter of law. As to the second objection, the plaintiff's title is on the bond; the assignment of it only prevents it from vesting in the assignees under the fiat. Messrs. Gardiner and Elgie had an interest under the deed adverse to that of the plaintiff; and the latter has no right to possession of the bond. On the third point, this is a complete transfer of the equitable interest in the bond. It appears on the pleadings that the security pledged is altogether for money; had land been the subject of the mortgage, perhaps it might have been necessary to show that no beneficial interest remained in the mortgagor.

PATTERSON, J.—I am of the same opinion. The plea concludes, that, by reason of the premises, and by force of the statute, the said J. and K. became assignees of the estate, and entitled to the said debt and cause of action. To traverse this would be a traverse of a *virtute cujus* in its strictest sense, and would admit all the preceding facts in the plea. (a) As to the want of proferet, it is unnecessary. If, indeed, there could be an assignment at law, and the assignees had been the plaintiffs, they must have made proferet of the deed. The necessity of proferet stands on the relation of the parties on the record; and, although the action is certainly brought for the benefit of the assignees, yet this is not, for all purposes, the same as if it had been brought by the assignees themselves in their own names. The deed is here inducement only, and not the foundation of the action. On the third point, it appears that the debt is of larger amount than the sum due on the bond. If, indeed, it had appeared that there were other securities given for the same debt, so as to make it doubtful whether there might not be some beneficial interest in the bond remaining in the obligee after payment of his debt, it might have been necessary to make some further averments: what the effect might have been, if the amount due on the bond had been greater than the debt due from the obligee, it is unnecessary for us to decide.

WILLIAMS, J.—The assignment is no part of the plaintiff's title, but is inconsistent with, and adverse to, it. As to the interest remaining in the assignor under the circumstances stated in the pleadings, I am at a loss to discover what it could be.

COLERIDGE, J.—Proferet is not required of a party not entitled to possession of the deed. Here it is an instrument adverse to the plaintiff's title; and, although there may be an identity of interest between the plaintiff and the parties who are suing in his name by virtue of the assignment, yet on a question of proferet we must look only to the actual parties on the record, and the interest which they derive under the instrument referred to.

S.

Judgment for the plaintiff.

(a) See note (5) to *Bennet v. Filkins*, Wms. Saunds. 23. *Craven v. Sanderson*, 4 A. & E. 666; (31 Eng. Com. Law Reps. 165.)

BATSON and others against SPEARMAN.—p. 298.

Debt against A. on a joint and several bond by A. B., and C. By the condition (which recited an agreement by the plaintiffs, bankers, to advance moneys not exceeding 200*l.* at any one time, to B. on security,) the bond was to be void if A., B., and C., or either of them, should pay to the plaintiffs all such sums not exceeding 200*l.* as plaintiffs should advance for or on account of bills from time to time drawn by B. on plaintiffs, *within three calendar months after receiving notice to pay such sums.*" Held, that the bond was a continuing security. Held also, on general demurrer, that, in assigning a breach of the condition, it was not enough to aver that defendant "had and received notice" that certain sums were due from B., without averring a notice or request to pay.

DEBT on bond. The bond was a joint and several one by defendant, by G. Rutherford, and by Henry Boag. The condition, as set out on oyer, was the following: "Whereas the said G. Rutherford hath opened an account with the said W. S. Batson, J. Wilson, and J. Langhorn" (the plaintiffs) "at their agent's office in Alnwick in the county of Northumberland, and the said W. S. Batson, J. Wilson, and J. Langhorn have agreed to discount bills of exchange and otherwise pay, lend, and advance to or for the said G. Rutherford, if he should have occasion, any sum or sums of money, not exceeding at any one or more time or times the sum of 200*l.* in the whole, upon having such security for the repayment thereof, with interest, as is contained in the above-written obligation with such condition as hereinafter contained. Now the condition of the above-written obligation is such, that, if the said G. Rutherford, Henry Boag, and R. Spearman the younger" (the defendant,) "or either or any of them, their or either or any of their executors or administrators, or any person or persons on their behalf, do and shall well and truly pay or cause to be paid unto the said W. S. Batson, J. Wilson, and J. Langhorn, and all and every other person or persons who shall or may become partner or partners with them in the said banking business, or any or either of them (or other the firm of the said house for the time being,) and their and each and every of their executors and administrators, all and every such sum and sums of money, not exceeding the sum of 200*l.* as aforesaid, as the said W. S. Batson, J. Wilson, and J. Langhorn, or any or either of them, or any future partner or partners of the said firm, or other the firm of the house for the time being, shall advance and pay, or be liable to advance and pay, for or on account of their accepting or paying any bill or bills of exchange, drafts, notes, or other securities or engagements whatsoever, which he the said G. Rutherford shall from time to time draw upon, or desire or request to be paid by, them, or make payable at their banking house, or which shall be discounted or paid, or credited in advance by them, for the said G. Rutherford, and also all and every other sum and sums of money which they the said W. S. Batson, J. Wilson, and J. Langhorn, or any or either of them, or other the firm of the house for the time being, shall have laid out, paid or advanced, or become in anywise liable to advance or pay, to any person or persons whomsoever, to or for or on the credit of the said G. Rutherford, or otherwise on his account, together with such lawful charges and allowances for advancing and paying such bill or bills, drafts, notes, securities, and engagements, as are usually charged by bankers in such and the like cases, and interest after the rate of 5*l.* per cent. per annum for such sums as they shall be in advance or in balance against the said G. Rutherford, *within three calendar months after receiving notice to pay and satisfy* such sum and sums of money, or the interest

so to accrue due as aforesaid, then the above-written obligation shall be null and void, or else shall be and remain in full force and entire."

Plea. Payment to plaintiffs by the said G. Rutherford according to the form and effect of the condition.

Replication. That, after making the said writing obligatory, plaintiffs advanced and paid divers large sums amounting to 200*l.* for and on account of paying divers bills, notes, and other securities which the said G. Rutherford had drawn on plaintiffs, and for and on account of paying other bills, &c., made payable by the said G. Rutherford at plaintiff's banking house: That a large sum, to wit 200*l.*, for and on account of the moneys so advanced and paid by plaintiffs, and of interest thereon after the rate mentioned in the condition, was, at the time of giving the notice thereafter mentioned, due from the said G. Rutherford, "whereof the defendant, three calendar months before the commencement of this suit, to wit on &c., had and received notice." And the replication averred, nonpayment by the defendant or his co-obligors. Verification.

Rejoinder. That, after the making of the writing obligatory, plaintiffs advanced and paid divers sums for and on account of paying divers bills, notes, and other securities, which the said G. Rutherford then drew on plaintiffs, and for and on account of paying divers other bills, &c., which the said G. Rutherford then made payable at the banking house of plaintiffs; that the last-mentioned sums so paid by plaintiffs amounted to 200*l.*; that the said G. Rutherford, according to the condition of the said writing obligatory, repaid to plaintiffs the said last-mentioned sums to the amount of 200*l.*; and that the sums of money, alleged in the replication to have been advanced and paid by plaintiffs, were paid after the said sums mentioned in the rejoinder had been so advanced and paid by plaintiffs, and also after the same had been so repaid by the said G. Rutherford as aforesaid. Verification. General demurrer.

W. H. Watson, for the plaintiff. This is a continuing security; *Williams v. Rawlinson*, 3 Bing. 71; (S. C. Ry. & Moo. 233; 11 Eng. Com. Law Reps. 34.) (Lord DENMAN, C. J. We are satisfied this is a continuing guaranty. There is no doubt.)

Wightman, contra. The replication is bad. The liability of the defendant is only a collateral one, as surety for Rutherford: there ought therefore to be a distinct averment of a request to pay; *Birks v. Tippet*, 1 Saund. 32, and note (2) to that case.^(a) Even the general averment of licet sæpius requisitus is not inserted here; nor, if it were, would it be sufficient; *Bach v. Owen*, 5 T. R. 409, per BULLER, J.^(b) [PATTESON, J. Would not that rather be matter for special demurrer?] It is substance, and part of the very terms of the contract. The condition is that the obligors shall pay "within three calendar months after receiving notice to pay." Here there is neither notice to pay, nor a request to pay. The defendant has a right to require compliance with these terms before a security is enforced against him, on the face of which he appears to be a mere surety.

W. H. Watson, in reply. This is, at most, only ground of special demurrer. It is averred that the defendant received notice that the money was due from the principal. The money being in fact due, and notice having been given to the defendant, the plaintiff has done all that, on a reasonable construction of the condition, can be required of him; the defendant stipulates for notice, and not for any request.

^(a) 1 Wms. Saund. 33 a.

^(b) But see *Bowdell v. Parsons*, 10 East, 859; *Radford v. Smith*, 8 M. & W. 254, 258.

PER CURIAM. (Lord DENMAN, C. J. PATTESON, WILLIAMS, and COLBRIDGE, Js.)—The notice alleged is only notice that Rutherford was in arrear; this would be satisfied by showing that an account had from time to time, been made out and sent, without showing any request to settle it, or to pay.

W. H. Watson then applied for leave to amend which was granted.

S.

Leave for plaintiff to amend.

PEARSON, Assignee of GRAHAM, a Bankrupt, &c. against ROGERS, GRAHAM, and PENN.—p. 303.

Trover by assignee of bankrupt for goods of the plaintiff as assignee, laying a conversion by three defendants. G., R., and P.

Plea by defendants R. and P., that after the bankruptcy, and two calendar months before the fiat, the plaintiff, as assignee, to wit, by the relation of his title to the act of bankruptcy, though not then appointed assignee, was owner, and entitled to the possession, of the goods, and the bankrupt was possessed of them subject to such title of the plaintiff; that two calendar months before the fiat, the defendant R. bona fide bought of the bankrupt, who then bona fide sold and delivered to R., the said goods at a reasonable price, and that, at the time of the sale, neither of the defendants had notice of any prior act of bankruptcy; whereby R. became possessed of the goods as of his own property, and that he, being so possessed, and P., as his servant, converted them; which is the same grievance, &c., without this, that at the time of the said conversion the goods were the property of the plaintiff as assignee. Conclusion to the country.

Held, on special demurrer to the plea, that the introductory part of it confessed and avoided the declaration, and the traverse was therefore idle.

Quære, whether the plaintiff might have pleaded the traverse as immaterial, and pleaded over?

TROVER by the assignee of James Graham, a bankrupt, for goods the property of plaintiff as such assignee, laying a conversion by the three defendants.

Plea, by two of the defendants, Rogers and Penn. That after Graham became a bankrupt, and more than two calendar months before the date and issuing of the fiat, and before the grievances complained of, plaintiff, as assignee of Graham (to wit, by reason of the relation of his, the plaintiff's title, as such assignee to the time of the bankruptcy, though not then appointed to be assignee,) was the owner of, and entitled to, the possession of the goods as of his property as such assignee; and the said Graham was then (subject only to such title of the plaintiff as assignee by relation,) possessed of, and entitled to, the same goods; and thereupon, after the bankruptcy of Graham, and more than two calendar months before the date and issuing of the fiat, while plaintiff was such owner and so entitled, and Graham so possessed and entitled, defendant Rogers bona fide bought, at a reasonable price, of the said Graham, and Graham then bona fide sold and delivered to defendant Rogers, at such price, the said goods; and that at the time of the said purchase, sale, and delivery, defendants had not, nor had either of them, notice of any prior act of bankruptcy by Graham; whereupon and whereby defendant Rogers became possessed of the goods as of his own property, and, being so possessed, he, in his own right, and defendant Penn as his servant, converted them &c., which is the same grievance, &c., "without this, that at the time of the said conversion, the said goods or any of them were the property of the plaintiff as assignee as aforesaid, or of

right belonged or appertained to him as assignee as aforesaid." Conclusion to the country.

Demurrer, assigning (inter alia) the following causes. That the plea in the inducement confessed a property in plaintiff as assignee, and then confessed a conversion by the purchase and sale to Rogers, and alleged matter in supposed avoidance of such conversion which the plaintiff had no opportunity of traversing or replying to. That the plea ought to have concluded with a verification. That the plea, after confessing a conversion, and alleging matter in supposed avoidance, went on to allege a subsequent conversion, being the same mentioned in the declaration, and concluded with a traverse, that at the time of the last-mentioned conversion, the goods were the property of plaintiff as assignee. That the plea was double, because two conversions were shown therein, and distinct answers were given to each. That it contained several distinct matters of defence, and that the matters stated in the inducement were inconsistent with the traverse at the end. That it ought not to have concluded with a traverse; and that the traverse was of a supposed conversion, not alleged in the declaration, and raised an immaterial issue. That the real question was thereby evaded, or not directly or formally raised, and the issue was attempted to be mixed up with a supposed subsequent conversion altogether beside the real question to be tried. That defendants, by tendering an issue, precluded plaintiff from new assigning, if necessary. That whereas the declaration alleged a joint conversion by three defendants, the plea confessed, and attempted to justify, a conversion by two of them only, and averred the conversion so confessed to be the same as that mentioned in the declaration, although the two were manifestly different and inconsistent. That the inducement was in the nature of a confession and avoidance of plaintiff's title, and the plea therefore ought to have concluded with a verification, and not to the country; and that the traverse was a negative pregnant, implying a denial, as well of the plaintiff's character as assignee, as of his property, as such assignee.

Wightman, for the plaintiff. The plea is bad for the reasons specified in the demurrer. It should conclude with a verification, and not with a special traverse; for the facts, stated in the preceding part of it, are, if true, an answer to the action, inasmuch as they confess the property to have been in the plaintiff by relation, but show a change in it by a bona fide sale within sect. 81 of stat. 6 G. 4, c. 16; (a) the plaintiff should therefore have an opportunity of traversing those facts. The sale to Rogers was a conversion, but the plea goes on to state a subsequent conversion by the two defendants, and then avers that the latter is the conversion complained of. The defendant has no right thus to impose a conversion on the plaintiff; yet if the traverse is material and rightly taken, the plaintiff must join issue on it, and cannot reply or new assign any other conversion than the one alleged by the defendant. The facts stated are no defence unless they admit that the property was in the plaintiff at the time of the conversion, yet they conclude with a denial of the property. It is a rule that where the plea confesses and avoids, a special traverse is bad. *Helyar's Case*, 6 Rep. 24 b, and others cited in note (5) to *Salmon v. Smith*, 1 Wms. Saund. 207 c.

Cresswell, contra. The traverse is good, and material, and, if so, it must conclude to the country. Reg. Gen. Hil. 4 W. 4, and General

(a) See now stat. 2 & 3 Vict. c. 29.

Rules and Regulations, sects. 10, 13.(a) The plea substantially admits a conversion, but denies the property. A simple denial of the property would have failed, for, according to *Pearson v. Graham*, 6 A. & E. 899, 900, (33 E. C. L. R.,) it should seem that there was a property in the assignee by relation at the time of the sale; so that, if the defendant had merely traversed the property, the plaintiff would have relied on the sale as a conversion, and would have succeeded upon that issue. Here the inducement states special circumstances consistent with the traverse, and points out the conversion which it professes to justify. It is not true that two conversions are justified in the plea. The first is a conversion by Rogers alone, viz. the sale and delivery to him; this is not a *joint* conversion, and is therefore not the conversion complained of. The plea admits a property in the plaintiff by relation until the sale to Rogers; after the property has passed to Rogers the plea admits a joint conversion, and then concludes, as it ought, with a special traverse of the plaintiff's property. Under that traverse the plaintiff must show property at the time of the conversion. It is not only the right, but the duty, of the defendant to specify the conversion which he assumes to be intended by the declaration, and which he intends to justify.

But, supposing the traverse to be bad, the plaintiff is not in a condition to insist upon this objection without specially assigning it as ground of demurrer: it is not enough to say that the plea "ought not to have concluded with a traverse," but it should be shown why the traverse is bad. The traverse is, at most, only immaterial, and the plaintiff might have replied over, or taken issue on the inducement; nor is there any reason why he should not have denied the identity of the conversion by new assigning another than the one justified by the plea. Suppose, however, the plaintiff had joined issue on the traverse, all the circumstances stated in the inducement would have been inquired into at the trial: In *Craven v. Sanderson*, 4 A. & E. 666, (31 E. C. L. R.,) where it had been held at Nisi Prius that by taking issue on a special traverse the matters alleged by way of inducement were admitted, this Court ruled differently, and granted a new trial upon that ground.

As to the supposed inconsistency of justifying a conversion by two defendants, when the declaration imputes a joint conversion by three, the defendants who have pleaded separately need only plead a justification sufficient for themselves.

With respect to the last cause of demurrer, it is not true that the traverse involves any denial of the plaintiff's character as assignee, which is clearly admitted on these pleadings; Reg. Gen. Hil. 4 W. 4, General Rules and Regulations, s. 21.(b)

Wightman, in reply. The objection is, not that the traverse concludes to the country, but that there is any traverse at all; the case is, therefore, not within the new rules. The defendant should have confessed the property of the plaintiff, and not the conversion: whereas he confesses the conversion, and then denies the property. If the traverse were omitted, the plea would be a good defence under sect. 81 of stat. 6 G. 4, c. 16. The case is analogous to that of a sale of goods in market overt, which should be pleaded without a traverse of the property; Com. Dig. *Pleader*, G. 5. *Stancilffe v. Hardwick*, 2 C. M. & R. 1, S. C. 5 Tyrw. 551, shows that it is a question of conversion, and not of property, and the plea should conclude with a verification. In effect, the plea admits

(a) 5 B. & Ad. v., vi., (27 E. C. L. R.)

(b) *Ibid.* vii.

the title of the plaintiff by alleging that a certain sort of property vested in him by relation. *Cur. adv. vult.*

Lord DENMAN, C. J. now delivered the judgment of the court.

This was a demurrer to the plea in an action of trover at the suit of the assignee of a bankrupt. Many grounds of demurrer were assigned, but the principal ground, into which, indeed, all the others may be resolved, was, that a special traverse was taken by the plea after the allegation of matter professing to be inducement, but which amounted, in truth, to confession and avoidance. No doubt can be entertained but that this ground of demurrer is fatal, if it be established to exist. See the cases collected, *Salmon v. Smith*, note (5), 1 Wms. Saund. 207 c, and *Bennet v. Filkins*, note 2, 1 Wms. Saund. 22. The law with respect to special traverses is well stated in Stephen on Pleading, 205, et. seq.

Upon attentively considering this plea we are satisfied that the introductory part of it does confess and avoid the declaration, and therefore that the traverse is idle, and the plea bad. The declaration charges a joint conversion by the defendants. The plea admits the property in the goods to have been in the plaintiff by operation of law, but alleges a bona fide purchase of it by one of the defendants more than two months before the issuing of the fiat in bankruptcy without notice of an act of bankruptcy; it then alleges the possession of the goods by that defendant, and the joint conversion by both. This is a direct confession of a conversion, and an avoidance of it by showing that it was a rightful conversion by reason of the bona fide purchase.

It may be very doubtful whether the plaintiff could have treated the traverse of the goods being the property of the plaintiff at the time of the conversion, as an *immaterial* traverse, and pleaded over to the introductory matter; a power which, we may observe, was not *given* by the rule, Hilary term, 4 W. 4, s. 13, but only *preserved* by it. It is sufficient to say that he was not bound so to treat it; and it is obvious that if he had, the question as to the traverse being immaterial, or not, must have been raised by a demurrer on the part of the defendants.

Judgment must be for the plaintiff.

Leave was given to the defendants to amend; but, it being afterwards represented to the court by *Hightman* that there had been a trial at the assizes against the defendant A. Graham, (a) and that contingent damages had been at the same time assessed against the other two defendants, the court withdrew the leave to amend, and gave

S.

Judgment for the plaintiff.

(a) See *Pearson v. Graham*, 6 A. & E. 899, (33 Eng. Com. Law Reps. 239.)

The QUEEN against The Inhabitants of SOMERBY.—p. 310.

A pauper, apprenticed to a carpenter in parish S., being disabled by an accident from working in his business, was taken by his master to his (the apprentice's) father's house in parish M. for the benefit of surgical attendance. He resided there forty days, and during such residence was employed by his master to sell tickets in a lottery in which the prizes were articles manufactured by the master, and was allowed by him 1s. on each ticket sold, in aid of his maintenance: Held, that he gained a settlement in M., although the sale of such tickets was illegal.

ON appeal against an order of justices removing John Dixon from the
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parish or township of Melton Mowbray in Leicestershire, to the parish of Somerby in the same county, the sessions confirmed the order, subject to the opinion of this Court on the following case.

The pauper, John Dixon, was by indenture, dated September 21st, 1805, bound apprentice to William Lane, of Somerby, carpenter and joiner, from the 5th day of the same month, for the term of seven years. The indenture contained covenants that the pauper should do all lawful commands of his master, and that his master should find him board, lodging, and washing during the term. The pauper served six years and two months in Somerby under this indenture, when he met with an accident, and became unable to work. He was, in consequence, taken by his master, on the morning following the accident, to his father's house in Melton Mowbray (which was six miles from Somerby) for the benefit of a surgeon's attendance, and he slept at his father's house from that time until the cancellation after mentioned, being a period of more than seventy days. His master called upon him at his father's house from time to time, to see how he was; and during that time, and whilst he was incapacitated from his ordinary employment under the indenture, his master asked him to carry out, and sell in the villages round about Melton Mowbray, lottery tickets, by which the holders would be entitled to draw in a lottery, where the prizes were articles manufactured by the master in his trade. This the pauper consented to do, and did, until the cancellation after mentioned. As a compensation for this service, the pauper received 1s. on the sale of each ticket, which his master observed would help to maintain him. The master also, on first taking the pauper to Melton Mowbray, promised to pay the surgeon his bill, but, he failing to do so, the pauper paid it himself. On the 1st of February, 1812, the pauper's father bought out the pauper's time for two guineas, which he paid to the master. His indenture was thereupon cancelled, and the master received such tickets as remained unsold.

The questions for the opinion of the Court were whether, under the circumstances stated in the case, there was either maintenance of the apprentice by the master in Melton Mowbray under the indenture or service by the apprentice in Melton Mowbray under it. If the Court should be of opinion that there was either such maintenance or such service, the order of sessions was to be quashed; if otherwise, to be confirmed.

Sir W. W. Follett, Burnaby, and Goldsmid, in support of the order of sessions. There was neither maintenance nor service under the indenture. Any assistance the pauper may have received from the sale of lottery tickets was unconnected with his service as apprentice, and was the subject of a distinct contract. The surgeon's bill was not paid by the master, nor was he in fact liable to pay it. The residence at Melton Mowbray should have been for the purposes of the apprenticeship, and in consequence of it; *Rex v. Ilkeston*, 4 B. & C. 64, (10 E. C. L. R.) The cases of *Rex v. Stratford-upon-Avon*, 11 East, 176, and *Rex v. Banbury*, 3 B. & Ad. 706, (23 E. C. L. R.,) will be relied on; those cases depend on *Rex v. Charles*, Bur. S. C. 706, but there the master and apprentice were both resident in the same parish. [WILLIAMS, J. How is the case distinguishable from *Rex v. Stratford-upon-Avon*? In that case as in this, the pauper was resident in a different parish on account of sickness, and was employed by the master to go errands, and do other work for him.] Here the only employment of the pauper in Melton Mowbray was not only unconnected with the object of the

apprenticeship, but was also an illegal occupation. There are several acts of parliament which make the sale of such lottery tickets illegal. (a) They are declared by the legislature to be a nuisance. [Lord DENMAN, C. J. Suppose the master had employed his apprentice to do work for him on the highway under circumstances that occasioned a nuisance, would he gain no settlement?] The service performed would give no settlement unless the master could have compelled him to do it; otherwise he might gain it by being employed to make signals in aid of smugglers. As to the maintenance derived from the sale of the tickets, it was not only a distinct contract, but was also in the nature of a bribe to do an illegal act.

J. Hillyard and G. T. White, contra, were stopped by the Court.

Lord DENMAN, C. J. The relation of apprentice continued during the residence of the pauper in Melton Mowbray. As to the alleged illegality of his occupation there, it would be hard, under such circumstances, to deprive him of his right of settlement, if he only obeyed his master's orders. If, indeed, the master and his apprentice had conspired to do unlawful acts, the case might have been different, and perhaps no settlement might then have been gained.

PATTESON, WILLIAMS, and COLERIDGE, Js., concurred.

S.

Order quashed.

(a) See 10 & 11 W. 3, c. 17; 9 Ann. c. 6; 8 G. 1, c. 2; 12 G. 2, c. 28; 42 G. 3, c. 119.

SHIPTON against THORNTON.—p. 314.

1. Where goods are shipped under a bill of lading in a general ship, which is prevented from completing the voyage in consequence of damage occasioned by tempest, *quarr*, whether the master is bound, if he has an opportunity, to forward the goods by some other conveyance to the place of destination.
2. At any rate, he is at liberty to do so, by a conveyance equally cheap, if he think fit; and if the goods arrive at the place of destination by such other conveyance, he is entitled, on the freighter obtaining the goods, to the whole freight originally contracted for: though the freighter was named as consignee in the original bill of lading, and the bill of lading under which the goods are shipped by the second conveyance makes another party consignee, and though, by the second conveyance, the goods are carried for less than the freight originally contracted for.
3. Defendant was interested solely in certain goods conveyed by the ship S., and was also interested jointly with his partners, who with him formed the firm of T. and W., in other goods also sent by the ship S. He signed a promise to make certain payments in respect of freight on board the S., not stating upon which goods, beginning, "I hereby engage to pay," but signed with the style of T. and W. In an action against him solely, for the freight of his own goods: Held, that such engagement was evidence of a several contract by him, and, for the purpose of the action, required only one stamp.
4. A witness called by plaintiff stated, on the voir dire, that he had, as agent for plaintiff, instructed an attorney, E., to commence the suit: that E. had carried on the suit to a certain stage, and had died; that witness had not told E. that he was to look to the plaintiff only for costs; that no demand of costs had been made upon himself; and that he had not been released. It did not appear under what circumstances the papers had been handed over to the present attorney, nor whether the costs of E. had been discharged. Held, that these facts did not show an interest sufficient to disqualify the witness.

ASSUMPSIT. The first count of the declaration (of Trinity term, 9 G. 4.) stated that, whereas, before the making of the promise, &c., plaintiff was master and owner of the ship James Scott, in which, before the making of the said promise, divers goods, to wit, &c., had been shipped, to be carried therein, on freight, from Singapore in the East Indies to London, consigned to defendant; and whereas, before the making the said promise, the said ship, in the course of the voyage from Singapore to

London, by and through the perils of the sea and stormy weather, &c., was compelled to go to Batavia in the island of Java, at which place the said ship afterwards, and before the making of the said promise, arrived in a state much damaged; and thereupon and there, to wit at Batavia aforesaid, *it became and was necessary* to unload the said goods, wares, &c., out of the said ship, and to put and load such part of the said goods as was not damaged by the sea-water or otherwise, amounting to divers, to wit &c. (stating quantity of goods,) into certain other ships called The Mountaineer and The Sesostris, for the purpose of carrying the said last-mentioned goods to London; and the same were accordingly unloaded, and put and loaded into and on board of The Mountaineer and The Sesostris, for the purpose aforesaid, by means and in consequence whereof *a difference in the amount of the freight* of the said last-mentioned goods arose, on account of their being carried by The Mountaineer and The Sesostris instead of The James Scott, of all of which &c. (notice to defendant, to wit on 14th October 1826, at London;) and thereupon defendant, afterwards, to wit on the same day, &c., in consideration of the premises, and also in consideration of the delivery of the said last-mentioned goods to defendant, undertook and then faithfully *promised plaintiff to pay to him the difference in the amount of the freight between The Mountaineer and The Sesostris and The James Scott*, where the same should be ascertained; averment, that the difference in the amount of the freight between, &c. was afterwards, to wit on the 2d April 1828, at, &c., ascertained, and amounted to a large, &c., to wit 600*l.*, whereof, &c. (notice to defendant.) The second count stated the loading of the goods on board The James Scott, whereof plaintiff was master and owner, consigned and to be carried as in the first count; that it became necessary to unload and reload (as in the first count, but without stating where or why;) that a difference of freight arose, which defendant promised to pay, in consideration of the premises (not adding of the delivery,) and which amounted to 600*l.*, of which defendant had notice. The third count substantially resembled the first, but related merely to The James Scott and Mountaineer. The fourth count substantially resembled the second, but related merely to The James Scott and Sesostris. Fifth count, indebitatus assumpsit for freight from Singapore to London. Sixth count, quantum meruit on the same. Seventh, eighth, and ninth counts, for money lent, money paid, and money had and received. Tenth count, on an account stated.

Plea, Non assumpsit.

On the trial before COLERIDGE, J. at the sittings in London after Trinity term, 1836, a witness was tendered for the plaintiff, named Ellwand, who stated, on the voir dire, that he had, as plaintiff's agent, employed an attorney named Edis, who had commenced the action; that Edis had been dead some time, and that there was a new attorney; that no demand had been made on the witness for costs; that he had not been released; that he had not told Edis that he was to look to the plaintiff, and not the witness for costs. It did not appear upon what, if any, arrangement as to bygone costs the papers had been handed to the present attorney. The defendant's counsel contended that Ellwand was incompetent, as being liable in respect of these costs to Edis's representatives. The learned judge admitted the witness.

It appeared that The James Scott was a general ship of which the plaintiff was owner and master, and that, she being at Singapore, certain

goods were, on behalf of defendant, their sole owner, shipped on board of her, under bills of lading, according to which the goods were to be delivered to defendant at London. The defendant was also interested in certain other goods, as a partner in the firm of Thornton and West, to which these last belonged; these goods were shipped at the same time with the others on board The James Scott, under similar bills of lading. The James Scott sailed from Singapore with the goods on board; but having suffered much injury from tempest, she put into Batavia for repair. The plaintiff, very shortly after arriving at Batavia, shipped some of both sets of goods on board a ship called The Mountaineer, and the remainder of such of the goods belonging solely to plaintiff as were fit to be forwarded, on board another ship, called The Sesostris, which two ships then lay at Batavia, bound for London. Upon these shipments, fresh bills of lading were made out, according to which all the goods were to be delivered to the witness Ellwand in London. Evidence was given to show the necessity of the transshipment. The freight, both of the goods sent by The Sesostris and of those sent by The Mountaineer, was less than the freight would have been respectively of the same goods from Singapore to London by The James Scott, according to the original bill of lading. The Sesostris and The Mountaineer reached London; and Ellwand took possession of all the goods. The defendant claimed them of Ellwand, producing the bills of lading of The James Scott. Ellwand delivered up the goods to the defendant, by indorsing the bills of lading of The Sesostris and The Mountaineer, on receiving from him the freight by those two ships. The plaintiff was also paid the freight by The James Scott to Singapore, at the rate agreed upon. But he claimed from the defendant the sum by which the freight on board The James Scott from Singapore at the stipulated rate exceeded that by The Mountaineer and The Sesostris. The plaintiff's counsel offered in evidence the following document, which was written by the defendant, and handed by him to Ellwand when the goods were delivered by Ellwand to him.

"Mr. W. Ellwand.

"London, 14th October, 1826.

"Dear Sir,—I hereby engage to pay you the difference in amount of freight between The Mountaineer and The James Scott, when the same shall have been ascertained. I am, &c.,

"R. and R. Thornton and West."

The paper had a single agreement stamp. Ellwand stated that, when he delivered up the goods, he claimed the difference of freight on behalf of plaintiff; that defendant agreed to pay it, but signed the memorandum, inasmuch as the amount was not then ascertained. The defendant's counsel objected to the admission of this document, on the grounds, first, that the contract related only to the goods belonging to Thornton and West; and, secondly, that, if it related also to the goods of the defendant solely, there should have been two stamps. They contended further that, independently of special contract, the defendant was not liable to the difference of freight.

The learned judge admitted the document, and directed the jury to find for the plaintiff, to the amount of the difference of freight, if they thought that the transshipment was necessary; and he reserved leave to move for a nonsuit. Verdict for the plaintiff. In Michaelmas term, 1836, *Cresswell* obtained a rule nisi for a nonsuit or a new trial. In Hilary term last, (January 26th, 1839, before Lord DENMAN, C. J., LITTLEDALE, WILLIAMS, and COLERIDGE, Js.)

Thesiger and *Cleasby* showed cause. First, as to the competency of Ellwand. It lies on the party objecting to show a disqualification: and the Court will insist the more strictly on this where the interest at any rate is so slight, arising only from the expense at the commencement of the cause, which might easily have been released. The employment of Edis was merely by Ellwand, in the character of the plaintiff's agent: that created no personal liability *prima facie*. It was not necessary that Ellwand should tell Edis that he was to look only to the plaintiff. The liability rested primarily on the principal, without any such express intimation. Besides, the witness, if he were made to pay these costs, might recover them from his principal, the plaintiff, and therefore he is indifferent. "It is not sufficient to suggest, or even to show a probability, or excite a suspicion, that the witness stands under circumstances which tempt him to represent the fact one way rather than the other; it is incumbent upon him to show it with certainty:" 1 Starkie on Evidence, 122, note (2), (2d ed.) [As to this they were stopped by the Court.] Secondly, one stamp on the agreement of 14th October, 1826, was sufficient. In *Powell v. Edmunds*, 12 East, 6, there were separate agreements by different parties on the same paper: a stamp was impressed on that part of the paper on which one agreement was written: and the stamp was also connected with that part by a receipt of the officer of the stamps acknowledging payment of the penalty by the agent of the party to that agreement. That, however, does not show that, where agreements cannot be so distinguished, the whole document is inadmissible; nor does it apply at all to a case where there are, not distinct agreements, but, as here, a single agreement into which several parties enter. In *Doe, lessee of Copley, v. Day*, 13 East, 241, the Court admitted slight evidence, as the position of the stamp, to show to which of several contracts the stamp was referable. The defendant here has an interest in all the goods to which the agreement relates, and might have been sued in respect of any, though, as to some, he might have pleaded in abatement. This makes the present a stronger case than *Davis v. Williams*, 13 East, 232, *Baker v. Jardine*, note (b) to *Davis v. Williams*, 13 East, 235, and *Allen v. Morrison*, 8 B. & C. 565, where it was held that one stamp was sufficient. [COLERIDGE, J. The defendant bound his partner as to the partnership goods, but not as to the goods which belonged to the defendant solely. The parties and the subject-matters are both so far distinct.] The stamp would have been sufficient for the purposes of an action against Thornton and West; and, if so, the two cannot be bound more than the one. The stamp acts require a stamp on an "agreement;" that is, on the document. There is no distinction made as to the way in which different parties become implicated. If the parties had been all present together, and the goods lying before them, and had been told that, unless they agreed to the payment, the goods should not be delivered to them, their agreement to do so would constitute but one "agreement," in the sense of the stamp laws. It is a single transaction as to the defendant. *Rex v. Louth*, 8 B. & C. 247, *Bowen v. Ashley*, 1 New R. 274, *Stead v. Liddard*, 1 Bing. 196, (8 E. C. L. R.,) illustrate this: in *Stead v. Liddard* there were, in fact, distinct agreements. But it will be found that, where there is a community of purpose, and a single transaction, the circumstance of there being separate interests and liabilities does not render

two stamps necessary. (a) The present objection, even if valid, affects only the goods sent by The Mountaineer, there being no partnership goods in The Sesostris. Thirdly, the agreement bound the defendant singly, as well as the two. In *Hall v. Smith*, 1 B. & C. 407, (8 E. C. L. R.) the defendant wrote an engagement in the first person for himself and partners; and he was held liable in a several action. There BAYLEY, J., said, "It is true, that he promises for himself and others, but he alone promises." [LITLEDAL, J. It is not said that a joint liability also was created there.] The present argument is only that the defendant is severally liable. Even if the letter were not his several contract, it would be evidence as an admission by him of his antecedent liability. It is not necessary to inquire whether the use of the word "I" would prevent the instrument from being available against the two. Fourthly, the defendant is liable, independently of the agreement. As to the freight to Java there can be no dispute; and, as to the rest of the voyage, the plaintiff was not bound to show that the transshipment was necessary. There was a single contract for the conveyance of the goods; and the defendant accepted them, and, having thereby (as must be presumed) satisfied himself of the facts, ratified what had been done as a performance of the contract. He claimed under the original bill of lading of The James Scott. [COLERIDGE, J. If the goods had been transhipped unnecessarily, the owner could obtain them only by claiming under the original bill of lading: is that, therefore, an admission of the necessity?] No objection was made. In *Cook v. Jennings*, 7 T. R. 381, LAWRENCE, J., says, "When a ship is driven on shore, it is the duty of the master either to repair his ship or to procure another, and having performed the voyage he is then entitled to his freight: but he is not entitled to the whole freight unless he perform the whole voyage, except in cases where the owner of the goods prevents him; nor is he entitled pro rata unless under a new agreement." At all events, the jury found the fact of the necessity, and there was evidence on which they might do this. [The argument on the evidence is omitted.] Then who is to have the profit arising from the transshipment? The owner of the goods has them carried by the instrumentality of the party with whom he contracted for the carriage at a fixed price. In *Hunter v. Prinsep*, 10 East, 378, (b) Lord ELLENBOROUGH said, "If the ship be disabled from completing her voyage, the shipowner may still entitle himself to the whole freight, by forwarding the goods by some other means to the place of destination." In *Lutwidge v. Grey*, in Dom. Proc. Abbott on Shipping, 307, (5th ed.) and *Luke v. Lyde*, 2 Bur. 882, S. C. 1 W. Bl. 190, it was held that the master, if the ship be disabled without his fault, entitles himself to the whole freight by hiring another ship which conveys the goods to the port of delivery, or by attempting to do so, if he be prevented by the owner of the goods. In *Luke v. Lyde* the original ship was a general ship, as here; so that no distinction arises from that circumstance; nor could there be any, on principle. Any profit, therefore, made by a diminution of the expense of the second conveyance goes to the master of the ship, just as any loss by an increase of expense would have fallen upon him. The claim of the master is on the original contract: there is no occasion, between him and the owner of the goods, for any new bills of lading while the former

(a) On this point see *Ramsbottom v. Davis*, 4 Mee. & W. 584.

(b) See p. 324.

bills of lading subsist, as was said by the Judge of the Court of Admiralty in *Lutwidge v. Grey*. And this answers the difficulty which, as was suggested from the bench, might be supposed to arise from the defendant's inability to obtain his goods without recourse to the original bill of lading. The doctrine laid down in Abbott on Shipping, page 303,(a) is, "The apportionment of freight usually happens, when the ship by reason of any disaster goes into a port short of the place of destination, and is unable to prosecute and complete the voyage. In this case we have already seen that the master may, if he will and can do so, hire another ship to convey the goods, and so entitle himself to his whole freight." It was urged, for the defendant, that the plaintiff was not entitled to tranship, because the insurance was thereby lost; but *Plantamour v. Staples*, 1 Marsh. Ins. 164, (3d ed.), S. C. note (a) to *Mitchell v. Edie*, 1 T. R. 611, shows that, where the transshipment is necessary, the insurance continues.

Cresswell, contra. First, as to Ellwand's competency. Edis might have recovered from him the expenses attending the early stages of the suit. An agent employing an attorney is liable to the costs, unless he expressly state that the attorney is to look to the principal, which is here negatived. It is not enough that he is known to be agent. Thus in *Burrell v. Jones*, 3 B. & Ald. 47, (5 E. C. L. R.,) the defendants undertook to pay rent "as solicitors to the assignees;" yet they were held personally liable. *Iveson v. Conington*, 1 B. & C. 160, (8 E. C. L. R.,) is also an authority for the defendant on this point. It is said that the witness might recover over; but the same answer might have been given in all the cases in which parties who have guaranteed the costs have been held incompetent. Secondly, as to the stamp on the document of 14th October, 1826. *Powell v. Edmunds*, 12 East, 6, and *Doe, Lessee of Copley v. Day*, 13 East, 241, show that evidence was necessary to connect the stamp with the agreement by the defendant alone, which the document is put in to establish. In *Davis v. Williams*, 13 East, 282, there was a subscription to a common fund: here the goods, to which the two agreements relate, are distinct. In *Baker v. Jardine*,(b) the subject-matter of the agreement, being one fund in which the parties who made the assignment had each a share, was single. *Stead v. Liddard*, 1 Bing. 196, (8 E. C. L. R.,) was merely a case of principal and surety to one contract. Thirdly, the agreement did not bind the defendant as to his goods. It could not be said that the firm of Thornton and West were not bound. *Hall v. Smith*, 1 B. & C. 407, differs from the present case: there the agreement was an original one; but here the agreements refer to contracts previously subsisting between the several parties: there the defendant signed his own name, though he added that it was for the whole; but here the signature is only that of the firm. [COLERIDGE, J. Supposing the signature here to be merely for the firm: might not the plaintiff use the document as evidence of the facts necessary to make the defendant liable also individually?] That might possibly be so, if the document had been a formal admission of the facts; but it is a substantive contract. Fourthly, there is no liability upon the defendant independent of express agreement. He was not the shipper of the goods on board *The Mountaineer* or *The Sesostris*. A consignee, who is not shipper, incurs a liability by taking the goods which are sent under a bill of lading contracting for the payment, and

(a) And see *Ibid.* p. 240.

(b) Note (b) to *Davis v. Williams*, 13 East, 285.

which the captain of the ship may withhold until payment be made. Here the defendant, by taking the goods, made himself liable for the freight earned by the carriage in *The Mountaineer* and *The Sesostri*; and that he has paid. That was a distinct contract. He was not consignee in the bill of lading. It is true that he produced the original bill of lading; but that cannot make him liable for the difference between the two prices of conveyance. It is said that the transshipment was necessary, and that the defendant is therefore bound to pay the whole freight originally contracted for. The authorities cited on the other side, as to this point, show only that, in such case, the master with whom the first contract is made may claim under that contract, if he perform the whole voyage under that contract, which he may continue by the new ship. But here the master had fresh bills of lading made out, with a new consignee: the right to demand delivery is, under the second contract, taken away from the original consignee; he therefore, if such a power be lodged in the first captain as the plaintiff contends for, can obtain the goods only by a contract with the new master, and might be driven to the alternative of rejecting the goods or paying an increased freight for them, if the rate were higher. *Plantamour v. Staples*, 1 Marsh. Ins. 164 (3d ed.), (a) is the only authority which has been cited to show that the insurance is continued; but the effect of that case seems to be merely that the underwriters are liable to whatever shall ultimately appear to have been bona fide expended in salvage. Here the necessity for the transshipment was not shown. The receipt of the goods by the defendant, and his signature of the agreement, prove nothing, unless full knowledge of the facts be brought home to him. (He then argued on the evidence.) [COLERIDGE, J. The defendant has not paid the freight pro rata from Singapore to Batavia.] He has never contracted to do so: the original contract has not been performed.

PER CURIAM.—We think the facts do not show with sufficient distinctness such an interest in Ellwand as to render his evidence inadmissible. We will consider the other points.

Cur. adv. vult.

LORD DENMAN, C. J. now delivered the judgment of the court.

This was an action tried at Guildhall by my brother COLERIDGE, in which the plaintiff recovered a verdict. Several objections were made at the trial, and renewed on motion before us.

The first of these was on the alleged incompetency of one Ellwand, the principal witness on the part of the plaintiff, on the ground of his liability to the attorney. Upon the voir dire he stated as follows: "I employed Mr. Edis, the attorney who commenced this action, as the plaintiff's agent: he has been dead some time. There is a new attorney: I have not been released; no demand has been made on me. I did not state to him he was to look to the plaintiff and not to me." It was argued, first, that, although the witness had in truth acted as the agent of the plaintiff, yet he had rendered himself personally liable; and then that this was the ordinary case of incompetency arising from the employment of the attorney in the cause. We are of opinion, however, that the facts stated differ this from the ordinary case, and that no objection was established with sufficient clearness to warrant the rejection of the witness. It is a well founded and important rule, that the objector to a witness on the ground of interest is bound to show the interest with cer-

(a) S. C. note (a) to *Mitchell v. Edie*, 1 T. R. 611.

tainty and clearness, and that it is not enough to give evidence of circumstances from which such interest is a probable inference, when, at the same time, other circumstances appear which make it probable, even in a less degree, that no such interest exists. For the judge, who is to decide the question, ought not to be called on to draw a conclusion of fact from conflicting evidence; as the law is to be pronounced upon the fact, there will be a difficulty in reviewing his decision as to the former, where the evidence admits of different conclusions as to the latter, because the grounds on which he has decided will be unknown. And, as objections on the score of interest are not to be favoured, the safe rule is to admit the witness, wherever there is a doubt on the fact. It is then still open for the objector to urge the same circumstances to the jury, as proper to lessen the credit of the witness with them; and, according as they, who are the fit tribunal to weigh questions of doubtful fact, believe or interpret those circumstances, it is to be presumed the testimony of the witness will operate with more or less weight on their minds.

According to these principles, the answers of the witness, in order to sustain the objection, should have clearly shown, first, that he had originally made himself liable to Edis; and, secondly, that, since Edis's death, the liability had remained unsatisfied, or had been transferred, and was continued in favour of the present attorney. Now, admitting, for the sake of the argument, that the first was to be legitimately inferred from the statement of the witness, the second was by no means made out. Until it was shown under what arrangement the papers in the cause had passed on Edis's death from his representative to the present attorney, it was, at least, equally probable that they had been satisfied before they parted with them; and there was no evidence that the witness had been a party to the transfer, or in any way retained the present attorney, so as to make him liable to *him* in respect of his original employment of Edis. Therefore, without interfering with the general rule, we think, in the case before us, that the objector had not gone far enough to substantiate the incompetency of the witness.

This makes it necessary to consider the next objection, which arose on the reception of a document under the following circumstances. The defendant, it appeared, traded on his own account, and also as partner with one West, under the firm of Thornton and West. Goods belonging to himself individually, and also goods belonging to the firm, had been shipped from Batavia for England on board *The James Scott*, and bills of lading transmitted to the defendant. These goods, under some alleged necessity, had been transhipped on board *The Mountaineer* and *The Sesostris* at Singapore; and these vessels were consigned to the witness Ellwand. The defendant, in an interview with him, claimed both parcels by virtue of the bills of lading which he held by *The James Scott*. The rate of freight agreed on by that vessel was considerably higher than that which the plaintiff, her owner, had procured the goods to be conveyed home for by *The Mountaineer* and *The Sesostris*; and the witness, on his behalf, claimed that difference. The defendant, as he stated, agreed to pay that difference; but, as the amount was not then ascertained, and he was desirous of receiving the goods at once, he signed two undertakings; and, upon the faith of it, the goods were delivered to him. That upon which the present question arose, and which related to the goods on board *The Mountaineer*, was as follows. [His lordship here read the instrument of 14th October, 1826, for which see p. 318, ante.]

This paper bore a single stamp: and its reception was opposed on the

ground, first, that, on the face of it, being signed in the name of the firm, it must be taken to refer to the partnership goods alone; for that the defendant had no right to bind the firm as to the freight of his own goods: and, secondly, that, if it could be held that this signature bound the defendant at all events, the undertaking beginning and ending in the singular number, yet, as it clearly bound the firm to the extent of the partnership goods, the instrument amounted to two undertakings, one by the defendant alone, as to his own goods, and another by the firm as to theirs; and, if so, there being two undertakings, as to two separate subject-matters, two stamps, it was said, were necessary. And, assuming this to be correctly argued, the case was distinguished from several cited in the argument, in which a community of interest, or a common divisible subject-matter, has been held to make a single stamp available though there have been many signatures to the instrument and it may, in certain senses, be said to evidence a plurality of contracts.

After much consideration, we are of opinion that this objection cannot prevail. In order to ascertain its force, it will be convenient to examine, in the first instance, what would be the effect of this instrument without reference to the stamp act?

It appears that the defendant had been applying for the delivery of both parcels of goods: he had an interest in both; and it was competent for him to make himself personally liable for the freight of both. In point of fact, he had delivered this undertaking as the means by which he was to procure the delivery of both parcels. Now, if he had written and signed an undertaking expressly naming both parcels, it cannot be doubted that it would have bound him for both, if signed in his own name: so, if he had signed the undertaking in question in his own name, as no distinction is made between the two parcels, and the words are large enough to cover both, we see no reason for saying that he would not have been liable for the freight of both. The question then is whether, having received the goods belonging to himself upon the faith of this undertaking, as well as those belonging to the firm, he can now object, in an action for the freight of the former, that this mode of signature does not bind him personally as to *this* freight, because the undertaking so signed would bind the firm as to the other freight, and the language of the instrument on its face may be satisfied by so applying it. We think he cannot. The names which he has chosen to affix as the signature are his own words, of his own choice, and must be taken most strongly against himself. His partner indeed could not be bound by his (the defendant's) agreement to pay for more than the freight of the partnership goods: but the defendant is liable on both accounts: and, when it is proved that he had been taking on himself to deal in respect of both, and delivered the undertaking in reference to both, it becomes immaterial what signature he affixes; for he, at least, must be bound by it.

If this would be the effect of the instrument independently of the stamp act, it remains to consider whether that makes any difference. Now, in the view we have taken of it, this is but one agreement, entered into by the defendant respecting the freight of two parcels of goods; and, being but one agreement, however many distinct articles it may embrace, one stamp only can be necessary. In the present action, the breach is only insisted on as regards the defendant's own goods: and the only question we have to consider is, whether it is properly stamped so as to be receivable in *this* action? Whether it may be tendered in some other action

is immaterial. If, indeed, we saw that there were two agreements on the face of the instrument, and only one stamp, then, because it would be uncertain to which agreement the stamp was intended to be applied, we ought to receive it as evidence of neither. But this difficulty is removed by considering it to be but one agreement; and, if it be but one entire agreement, embracing for its subject-matter the freight both of the defendant's goods, and the goods of the firm, the legal conclusion is that it founds an action against him as to both, and against the firm as to neither.

It remains to consider an objection to the plaintiff's recovery, which is directed more to the merits of the case. Upon the trial, it appeared that the plaintiff had been paid freight by The James Scott, at the rate originally agreed on for so much of the voyage as had been performed up to the ship's arrival at Singapore, and for the remainder of the voyage to London at the rate at which he had contracted for the carriage of the goods by The Mountaineer and The Sesostris. The action was brought for the difference between the two rates for that portion of the voyage. And it was objected that, for this portion of the voyage, he was not entitled to receive more than he had actually paid; while, on the part of the plaintiff, it was contended that, the necessity of the transshipment being assumed, which it must be for the purpose of the argument, The Mountaineer and The Sesostris were to be considered as The James Scott. That the master had fulfilled his undertaking in carrying the goods to their destination, and had therefore earned his full freight, while it was a matter of indifference to the owner of the goods whether they had arrived safe by one vessel or the other. No authority bearing directly on the point from our own law books was cited on either side in the argument: it was treated very much as a new point, to be decided on principle; and our own researches have led us to the same conclusion.

On the part of the defendant we were pressed with the impolicy of holding out any temptation to the ship owner or master to make unnecessary transshipments of goods; the inconvenience of any transshipment, whereby the goods themselves run the hazard of damage, the policy of insurance may become questioned, and the owner of the goods, at all events, loses the benefit of a conveyance by that vessel in which he may be supposed to have confidence, and for which, at all events, he has stipulated: all these circumstances, coupled with a consideration of the unprotected state in which his interests are at a distant port must certainly be allowed to have great weight. But, after all, these seem to point to a vigilant examination of every case of transshipment, to see that its necessity be well established, rather than to decide the present question. This must turn upon the nature of the contract between the parties as it is to be collected from our own books, and still more fully, perhaps, from those foreign laws and ordinances, as well as the writings of jurists, to which our courts have long been accustomed to have recourse for guidance on subjects of this nature. It is clear that by the contract, the shipowner (and the master as his agent) is bound to carry the goods to their destination, if not prevented from doing so in his own ship by some event which he has not occasioned, and over which he has no control. The master (says Lord Tenterden in his book *On Shipping*, part 3, ch. 3, § 8 b, page 241, (5th ed.) "should always bear in mind that *it is his duty to convey*" the cargo "*to the place of destination*". This is the purpose for which he has been intrusted with it, and this purpose he is bound

to accomplish by every reasonable and practicable method." When, however, such an event has occurred to interrupt the voyage, as above defined, and the shipowner or master (for we think no distinction can be made between the two) has no opportunity of consulting the freighter, there seems to be much disagreement in foreign ordinances and jurists on the point whether or no he is *bound* to tranship, or whether, having contracted only to carry in his own ship, he is not absolved from further prosecution of the enterprise by the *vis major* which prevents his accomplishing it in the literal terms of his undertaking. By the Rhodian law, (a) the laws of Oleron, s. 4, (b) and the ordinances of Wisbury, art. 16, (c) the master was at liberty, but was not bound, to tranship: the old French Ordinance, on the other hand, in precise terms imposed the obligation upon him; "*en cas que le vaisseau ne puisse estre racommodé, le maistre sera obligé d'en louer incessamment un autre:*" art. 11, Titre Du Fret. (d) The terms of this ordinance occasioned, however, much controversy. Pothier (e) and Valin (g) maintaining that they were not imperative, except as the condition of earning full freight; Emérigon, on the other hand, insisting that the duty was strictly cast upon the master, as the agent of the freighters. (h) The modern French code appears to adopt this view of the question; the words of the Code de Commerce, s. 296, liv. ii. tit. 8, are on this point almost the same as those we have cited from the Ordinance; and it is stated by Chancellor KENT, who, in his Commentaries, vol. 3, p. 210—213, (3d ed.,) very ably and learnedly sums up the whole question, that Boulay-Paty (i) and Pardessus, (k) in their commentaries on it have agreed in holding to the construction adopted by Emérigon. All authorities, however, are in unison to this extent, that "the master is *at liberty* to procure another ship to transport the cargo to the place of destination:" and in these words Lord Tenterden cautiously lays down the rule of our law: p. 240, part 3, c. 3, s. 8. It may therefore be safely taken to be either the duty or the right of the shipowner to tranship in the case above supposed; if it be the former, it must be so in virtue of his original contract: and it should seem to result from a performance by him of that contract that he will be entitled to the full consideration for which it was entered into without respect to the particular circumstances attending its fulfilment: on the other hand, if it be the latter, a right to the full freight seems to be implied; the master is at liberty to tranship; but for what purpose, except for that of earning his full freight, at the rate agreed on? In the case supposed, we may introduce another circumstance; let the owner of the goods arrive, and insist, as he undoubtedly may, that the goods shall not proceed, but be delivered to him at the intermediate port: there is then no question that the whole freight at the original rate must be paid; and that because the freighter prevents the master, who is able and willing, and has the right to insist on it, from

(a) See the Greek text in Pardessus, Collection de Lois Maritimes, tom. i. p. 256, ch. vi. s. 42.

(b) Pardessus, Collection de Lois Maritimes, tom. i. p. 325, ch. viii. art. 4.

(c) Pardessus, Collection de Lois Maritimes, tom. i. p. 472, ch. xi. art. 18.

(d) Liv. iii. tit. iii. Pardessus treats this as copied from the 4th article of the laws of Oleron, before cited. Collection de Lois Maritimes, tom. 4, p. 362, ch. xxvi.

(e) Œuvres, tom. ii. p. 394, ed. 2, (1781.) Contrats de Louages Maritimes, part 1, (Charte-partie,) sect. 3, art. 2, § 3, num. 68.

(g) Nouveau Commentaire sur l'Ordonnance de la Marine, lib. iii. tit. iii. (Du Fret ou Nolis art. 11, (tom. 1, p. 651, ed. 1766.)

(h) Traité des Assurances, (tom. 1, p. 423, ed. 1827,) ch. xii. se. x. 16.

(i) Cours de Droit Commercial Maritime, tom. 2, p. 400—405, (ed. 1834,) tit. 7, s. 8.

(k) See Cours de Droit Commercial, tom. 1, p. 363, (ed. 6,) part 4, tit. 4, c. 2, s. 715.

fulfilling the contract on his part, and because the sending the goods to their destination in another vessel is deemed a fulfilment of the contract. If, therefore, the owner of the goods be not present, and personally exercises no option, still the shipowner, in forwarding the goods, must have the same rights, and, in so doing, must be taken to exercise them with the same object in view.

We come to the conclusion, therefore, that the plaintiff in the present case was entitled to recover the difference he sued for. And, in the examination we have made, we have been compelled purposely to omit many states of circumstances, and modes of testing the argument which would not have been without their weight, but yet are of much consideration.

One question, however, has been asked, which it will not be right to pass over. What, it has been said, if the transhipment can only be effected at a higher than the original rate of freight? Which party is to stand to that loss? By the French Ordinance (a) and the Code de Commerce, (b) and according to the decisions in America (to which Chancellor KENT refers, 3 Com. 212,) the shipowner is entitled to charge the cargo with the increased freight, and, as a consequence of that rule, it becomes an average loss; and, in case of an insurance, must be made good by the insurers; Emérigon, *Traité des Assur.* ch. xii. s. 16, tom. 1, p. 426, Code de Com. 350, liv. ii. tit. 10. No case of the sort that we are aware of has occurred in this country; nor is it necessary for us to express any opinion further than as it bears on the present question. It may well be that the master's right to tranship may be limited to those cases in which the voyage may be completed on its original terms as to freight, so as to occasion no farther charge to the freighter; and that, where the freight cannot be procured at that rate, another but familiar principle will be introduced, that of agency for the merchant. For it must never be forgotten that the master acts in a double capacity, as agent of the owner as to the ship and freight, and agent of the merchant as to the goods; these interests may sometimes conflict with each other; and from that circumstance may have arisen the difficulty of defining the master's duty under all circumstances in any but very general terms. The case now put supposes an inability to complete the contract on its original terms in another bottom, and, therefore, the owner's right to tranship will be at an end; but still, all circumstances considered, it may be greatly for the benefit of the freighter that the goods should be forwarded to their destination, even at an increased rate of freight; and, if so, it will be the duty of the master as his agent to do so. *In such a case*, the freighter will be bound by the act of his agent, and of course be liable for the increased freight. The rule will be the same whether the transhipment be made by the shipowner or the master; and in applying it, circumstances make it necessary, on the one hand, to repose a large discretion in the master or owner, while the same circumstances require that the exercise of that large discretion should be very narrowly watched.

(a) See Emérigon, *Traité des Assurances* (tom. 1. p. 424,) ch. xii. s. 16, from which it seems that the only authorities in the ordinance are that already cited, (liv. iii. tit. 3, art. 11,) and liv. iii. tit. 3, art. 21, which is as follows, "Le maître sera aussi payé du fret des marchandises sauvées du naufrage, en les conduisant au lieu de leur destination." Pardessus, tom. 4, p. 363.

(b) See art. 350, cited in the text, post. And the note, in Rogron's edition (1836,) to art. 296. Also art. 393

Lastly, it was urged, upon the evidence in this case, that the jury had not been warranted in the conclusion to which they came that the transshipment had been justified. But we are of opinion that this was for their consideration, and they were properly told that it lay upon the plaintiff to satisfy them of the propriety of the measure; there was evidence which warranted the verdict, and we do not feel willing to disturb it. Perhaps, indeed, the plaintiff might have complained of the manner in which it was left to the jury; for the defendant, with a full knowledge of the fact, had expressly promised to pay the freight in order to procure the delivery of the cargo, and had thereby obtained it. The rule, therefore, will be discharged. Rule discharged

The QUEEN against The Justices of CAMBRIDGESHIRE.—p. 338.

The QUEEN against The Justices of SHROPSHIRE.

The QUEEN against The Justices of GLOUCESTERSHIRE.

These cases are reported, 7 A. & E. 480.

The QUEEN against HALE.—p. 339.

A mandamus will not go to compel the lord of a manor to grant a license to a copyholder to demise his copyhold land on an alleged custom that the tenant may demise for three years without license, and that, for license to demise during a longer term, the lord shall have a sum certain for every year of such term.

TALFOURD, Serjt., had obtained a rule, in Trinity term last, calling upon the prebendary of St. Paul's, London, lord of the prebendal manor of Islington in Middlesex, and his steward of the said manor, to show cause why a mandamus should not issue commanding them to grant to the Master, Wardens, and Commonalty of Freemen of the art or mystery of Clothworkers of the city of London, or to their trustees, a license to demise, for a term of forty years, to E. F. a piece of ground, parcel of the said manor, and abutting, &c., and also to demise, for a term of twenty-one years, to T. F. a piece of ground, parcel, &c.(a)

(a) In the same term, *Talfourd*, Serjt., obtained another rule, calling on the same parties to show cause why a mandamus should not issue, commanding them to grant to the master, &c., or to their trustees, a license to dig five acres of brick earth in their copyhold premises, parcel of the said manor, on payment of the accustomed sum of 21*l.* for every such acre. The affidavits contained statements for the purpose of showing that the lord was bound, by the custom of the manor, to grant the license on the above terms.

On the day on which the case in the text was argued, and before the same Judges, Sir J. Campbell, Attorney-General, showed cause, and *Talfourd*, Serjt., and Sir W. W. Follett were heard in support of the rule. The same objection was made, in showing cause, which prevailed in the case in the text; and *Ballard v. Agard*, (6 Vin. Abr. 240, *Copyhold*, (Y. e.) pl. 3.) was cited in support of the rule, as showing that a suit would lie in equity to compel a lord to grant a license to let a copyhold.

Lord DENMAN, C. J., on the following day, (June 14.) said that, considering the nature of the alleged custom, the Court were not satisfied of its existence by the affidavits.

Rule discharged.

From the affidavits it appeared that the Company of Clothworkers were copyholders of the manor; and facts were stated to show that the tenants had a right to demise, for a term not exceeding three years, without license, and that, for a longer term, the lord, for every license to demise, was entitled to 4*d.* for every year of the term. In the same term,^(a)

Sir *J. Campbell*, Attorney-General, showed cause. No instance can be found of a mandamus to grant a license. If the lord's license be necessary, he is entitled to refuse it: a license, *ex vi termini*, is matter of discretion. In *Grove v. Bridges*,^(b) a custom that, on payment of ten years' rent, the lord should license to let for ninety-nine years, and, if he refused, the tenant might do it without license, was adjudged good. That is simply a custom that the tenant may let on payment of so much money: if the money were tendered, and the lord refused the license, the tenant might still let: so that no mandamus would go to command the lord to license. In *Porphyry v. Legingham*, 2 Keb. 344, it was held a good custom for tenants, living at ten miles' distance, to be excused suit of Court for twelve months, on paying 8*d.* to the lord and 1*d.* to the steward; but it was not said that a mandamus would go to compel the lord to allow such excuse. Here, however, the custom shown is, not that the tenant can demise for more than three years without license, but that the lord, if he license, may demand payment at the alleged rate.

Talfourd, Serjt., and Sir *W. W. Follett*, contra. A license is no more a matter of discretion than an admittance: the lord exercises a power, but his exercise of it is under the control of the custom, which this Court will enforce by mandamus. In 1 Scriv. Cop. 545, (3*d* ed.,) it is said, "The terms upon which the lord's license for a copyholder to demise is to be obtained, must depend upon the custom of each particular manor, in like manner as the fine on admittance; but the license is usually given either in or out of court, as a matter of course, on payment of a certain fixed sum for each house or acre of land, for each year of the term of the proposed lease;" and *Kitchin*, pp. 166, 242, (3*d* ed.,) is cited. Here such a custom appears: if the lord could refuse to license on the usual terms, he might demand any sum he pleased, which would, in effect, destroy the right of the copyholder to demise.

Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the Court. This was an application for a writ of mandamus to the lord of a manor to grant to a tenant a license to demise his copyhold for a term of years. The only ground for the application is an alleged custom in the manor that the lord should receive 4*d.* per annum for such a license.

Independent of such a custom, it is plain that the granting or refusing a license is a matter wholly in the lord's discretion; and the question is, what is the operation of such a custom.

On the one hand, it is said that, if the lord can, notwithstanding the custom, refuse to license altogether, he may indirectly extort a larger sum for a license than the custom warrants; therefore his discretion

(a) June, 18th, 1838. Before Lord Denman, C. J., Littledale and Patteson, Js., absente Williams, J.

(b) Cited by Moreton, J., in *Porphyry v. Legingham*, 2 Keb. 344; S. C. cited Gilb. Ten 294, where it is said, "Yet the license seems unnecessary here, since it may be done without it." See 1 Scriven on Copyholds, 645, (3*d* ed.)

must be taken away. On the other hand, it is argued that, if the custom compels the lord to license, it in effect amounts to a custom to demise without license, paying 4*d.* per annum; which custom is not directly asserted or pretended to exist, but, if it do exist, the tenant may demise on tendering the 4*d.* per annum without danger of forfeiture, and does not want the assistance of this Court.

No instance is to be found of this Court granting a mandamus to the lord to license under any circumstances. It is said to have been decided that he may be compelled to do so in equity; (a) but the authority cited is by no means clear or satisfactory.

Under these circumstances, we are of opinion that the rule for a mandamus must be discharged. Rule discharged.

(a) See p. 339, note (b) ante.

EVANS against JAMES ELLIOT, SAMUEL ELLIOT, and PATRICK.—p. 342.

Where a mortgagor in possession makes a lease, after the mortgage, reserving rent, the mortgagee cannot, by merely giving the lessee notice of the mortgage, and that principal and interest are in arrear, and requiring such lessee to pay the rent to him, make the lessee his tenant, or entitle himself to distrain for rent subsequently accruing under the terms of the lease. Nor, if, after such mortgagee's death, his executors distrain for rent accrued before his death, but after the notice, and avow upon a holding by the lessee under the terms of the original lease, as tenant to the mortgagee, will such avowry be supported by proof that, after the mortgagee's death, the lessee paid the executors rent, in sums and at periods corresponding to the reservation in the lease, and recognised them as his landlords by letter; such a recognition not having relation back to the notice.

Quere, how far the mortgagee by his own conduct, as by permitting the mortgagor to remain in possession and to lease, without interfering, may preclude himself from treating the mortgagor and his lessee as trespassers?

REPLEVIN. Avowry by James Elliot and Samuel Elliot, and cognisance by Patrick, as their bailiff, for 27*l.* 10*s.* rent, for half a year ending 29th September 1832, stating the locus in quo to have been, before and on and after that day, held and enjoyed by plaintiff as tenant thereof to Samuel Elliot deceased, under a demise at a rent of 55*l.*, payable half yearly, to wit 25th March and 29th September; and that, after the said 27*l.* 10*s.* became due, Samuel Elliot died, and made the defendants James Elliot and Samuel Elliot his executors. There was also another avowry and cognisance, which led to a demurrer, on which judgment was given for the plaintiff. (See *Evans v. Elliot*, 5 A. & E. 142, 31 Eng. Com. Law Rep. 301.)

Pleas in bar, to the first avowry and cognisance, 1. Riens in arriere.
2. Non tenuit modo et formâ. Issues thereon.

On the trial before Lord DENMAN, C. J., at the Brecknockshire summer assizes 1836, the plaintiff proved that, in 1830, Philip Elliot, being then in possession of the locus in quo, granted to the plaintiff a lease (or agreement for a lease), for a term of eleven years, at 55*l.* per annum, payable as stated in the pleadings; and that the plaintiff took possession under the lease, and held till the time of the distress, which was made in November 1834. The plaintiff paid rent to Philip till Michaelmas 1832, including the rent then due. The defendants proved that, by indenture of 11th August 1827, between Philip Elliot, of the first part, and the testator Samuel Elliot, of the second part, in consideration of 1100*l.* paid to Philip by the testator, Philip bargained, sold, and demised to him the

locus in quo, habendum to the testator, his executors, &c., for 1000 years, subject to a proviso for cesser of the term on repayment of the 1100*l.* with interest. Philip continued in possession: but, the interest having become in arrear, the testator, on 3d May 1832, gave the plaintiff notice of the mortgage and that the principal and a considerable sum for interest were due; adding, "I do therefore give you notice not to pay any rent now due, or hereafter to become due, from you, for the said messuages," &c., "to the said Philip Elliot, or to any other person or persons on his behalf, but to pay the same rent and arrears of rent to me," &c. The testator died in December 1832, leaving the defendants James and Samuel Elliot his executors. The plaintiff on two occasions paid half a year's rent, 27*l.* 10*s.*, to the executors, at periods corresponding to the reservation in the lease; and he wrote to them letters in which he requested them to perform certain repairs on the property, saying, "I am satisfied I cannot live under you as tenant, unless you will put the building more comfortable," and "you cannot expect of one to build on your premises." The Lord Chief Justice, on these facts, considered that the defendants' case was made out, and directed a verdict for them. In Michaelmas term 1836, *Chilton* obtained a rule for a new trial, on the ground of misdirection. In Hilary term last, (January 27th, 1838, before Lord DENMAN, C. J., LITLEDALE, WILLIAMS, and COLERIDGE, Js.)

Evans and *Nicholl* showed cause. It will be contended that notice, by the mortgagee, to a party who has become tenant under a lease granted by the mortgagor after mortgage, does not make him tenant to the mortgagee under such lease; and the dicta in *Partington v. Woodcock*, 6 A. & E. 690, (33 E. C. L. R.,) S. C. 5 N. & M. 672, (36 E. C. L. R.,) will be referred to. In that case it was urged, on the authority of *Pope v. Biggs*, 9 B. & C. 245, (17 E. C. L. R.,) that the mortgagor's tenant may show, against the mortgagor, that the mortgagee, under a mortgage prior to the commencement of the tenancy, has demanded the rent: upon which PATTESON, J., remarked that he never could see how notice could make the mortgagor's tenant tenant to the mortgagee at the former rent, though a new tenancy might be created at the old rent: and LITLEDALE, J., seemed to think that the mortgagee had no remedy but ejectment. *Partington v. Woodcock* can scarcely be considered an authority, for no formal judgment was given; so that *Pope v. Biggs* is not overruled. The language of BAYLEY, J., in *Pope v. Biggs*, goes quite as far as is requisite for the defendants' case here. "I have no doubt, that in point of law, a tenant who comes into possession under a demise from a mortgagor, after a mortgage executed by him, may consider the mortgagor his landlord so long as the mortgagee allows the mortgagor to continue in possession and receive the rents; and that payment of the rents by the tenant to the mortgagor, without any notice of the mortgage, is a valid payment. But the mortgagee, by giving notice of the mortgage to the tenant, may thereby make him his tenant, and entitle himself to receive the rents. It is undoubtedly a well established rule, that a lessee cannot dispute the title of his lessor at the time of the lease, but he is at full liberty to show that the lessor's title has been put an end to." The acquiescence of the tenant is not there considered requisite, but only notice, which is said to have the effect of attornment. The situation in which the mortgagor in possession legally stands has been differently described. It is now agreed that a mortgagor cannot bring ejectment or trespass. In *Doe dem. Rogers v. Cadwalla-*

der, 2 B. & Ad. 473, (22 E. C. L. R.,) it was held that the mere receipt of interest by the mortgagee is not an admission that the mortgagor, or his tenant, is in lawful possession of the premises at the time: but Lord TENTERDEN there recognised the authority of *Doe dem. Whitaker v. Hales*, 7 Bing. 322, (20 E. C. L. R.,) where such an admission was implied from the mortgagor having demanded the rent of the tenant by way of payment of the interest, and threatened a distress. It is true that LITLEDALE, J., in *Doe dem. Rogers v. Cadwallader*, questioned that: but in the present case there is a demand by the mortgagee of rent, as rent; a payment of it; and letters afterwards recognising the relation of tenant and landlord; so that there is a virtual attornment. Stat. 4 Ann. c. 16, ss. 9, 10, gives the effect of attornment to notice in the cases there mentioned, when the tenant remains in possession. An attornment relates back to the accruing of the title: that is, in the present case, to the notice. After this the tenant could not deny the mortgagee's title as landlord, nor could the mortgagee treat the tenant as a trespasser. In *Pope v. Biggs*, 9 B. & C. 245, (a) (17 E. C. L. R.,) PARKE, J., says that "The mortgagor may be considered as acting in the nature of a bailiff, or agent, for the mortgagee." [Lord DENMAN, C. J. If the mortgagor made the lease as agent to the mortgagee, the mortgagee has been landlord throughout.] The mortgagee takes to the contract: it is like an assignment of the reversion. [Lord DENMAN, C. J. But nothing is assigned after the lease.] In *Moss v. Gallimore*, 1 Doug. 279, Lord MANSFIELD said that the mortgagor was not tenant at will to the mortgagee properly, but only *quodam modo*. In *Keech, lessee of Warne, v. Hall*, 1 Doug. 21, (b) he had been understood to describe the mortgagor as tenant at will. In a case later than *Partington v. Woodcock*, namely, *Doe dem. Jones v. Williams*, 5 A. & E. 291, (31 E. C. L. R.,) PATTESON, J., said, "One is much at a loss as to the proper terms in which to describe the relation of mortgagor in possession and mortgagee. In *Partridge v. Bere*, 5 B. & Ald. 604, (7 E. C. L. R.,) such mortgagor is held to be tenant to the mortgagee; sometimes he is said to be the bailiff of the mortgagee; and in a late case, (a) Lord TENTERDEN said that his situation was of a peculiar character. But it is clear that his possession is, at all events, not adverse to the title of the mortgagee." The mortgagee, therefore, could not treat the mortgagor, or those holding under him, at any rate after notice, as trespassers. That being so, if he cannot proceed for the rent he is without remedy. *Pope v. Biggs* is confirmed in *Waddilove v. Barnett*, 2 New Ca. 538, (32 E. C. L. R.,) it was also cited in *Vallance v. Savage*, 7 Bing. 595, (20 E. C. L. R.,) and TINDAL, C. J., there said, afterwards, "Even in the case of mortgagor and mortgagee, whose interests are adverse, acts of the mortgagor assented to by the mortgagee are considered as acts of the mortgagee." Here, also, nothing is said of the necessity of acquiescence by the tenant. It will be suggested that *Pope v. Biggs* is impugned by *Rogers v. Humphreys*, 4 A. & E. 299, (31 E. C. L. R.,) That case, however, decides only the relation of the mortgagee to a party coming in under the mortgagor's lease, made after mortgage, where no notice has been given, and where there has been no payment of rent or acceptance of it: but it is said that, where there has been such payment and accept-

(a) See p. 258.

(b) See notes on this case and *Moss v. Gallimore*, in 1 Smith's Leading Cases, 295, 816.

(c) Perhaps *Doe dem. Roby v. Maisey*, 8 B. & C. 767, (15 E. C. L. R.,)

ance, the remedy would depend on the particular circumstances of the case, and a relation of landlord and tenant is created between the mortgagee and the tenants. [COLERIDGE, J. Is the notice to have a different effect according as the deed is by lease or not? Do you say that the mortgagee comes in as if his name were incorporated in the lease? Is there a new tenancy created, or is the old continued?] As between the mortgagee and the tenant, the facts are tantamount to a recognition, by the mortgagee, of the mortgagor's authority to grant the lease: the tenant, therefore, holds on the old terms. The principal claims the benefit of the contract made by his assent, as in *The Duke of Norfolk v. Worthy*, 1 Camp. 337. *Alchorne v. Gomme*, 2 Bing. 54, (9 E. C. L. R.), is distinguishable. According to the plea in bar there, the tenant was distrained on by his lessors, who claimed under the mortgagor; and the plea insisted on want of title in the lessors at the time of the lease; at least the plea was so construed by the Court.

Sir W. W. Follett, Chilton, and E. V. Williams, contra. First, laying out of consideration acquiescence by the tenant, the mortgagee cannot, by giving notice, entitle himself to distrain, where the lease has been granted after mortgage. The notion that the mortgagee has such a power has arisen from a confusion between legal and equitable rights. Legally, the mortgagor's lease is a lease by a party having no title, or, at the most, being merely a tenant at will or by sufferance, and therefore without power to lease. The legal owner is the mortgagee. So far the cases are all consistent, from *Keech, lessee of Warne, v. Hall*, 1 Doug. 21, to *Doe dem. Rogers v. Cadwallader*, 2 B. & Ad. 473, (22 E. C. L. R.); there is no doubt that the mortgagee, if he will, and if he abstain from giving notice, may treat the tenant as a trespasser. It is true that the mortgagee may so act, as in *Doe dem. Whitaker v. Hales*, 7 Bing. 322, (20 E. C. L. R.), that he precludes himself from insisting upon his right. In this respect the case is no more than that of a lease made by any party without colour of title; the real owner may, by his conduct, preclude himself from treating the lessee as a trespasser. But it is contended on the other side, that the mortgagee has the option of treating the tenant as a trespasser, or as his tenant. This suggests the question, whether the tenancy be the old or the new one. Suppose the mortgagor to have leased by deed for twenty-one years, with covenants: can it be contended that the mortgagee becomes the lessor and the covenantee, under this instrument, by virtue of a notice given by him to the lessee and covenantor? The difficulty is the same where the lease is without deed. The parties may enter into a new lease, and create a fresh relation of landlord and tenant, as any owner of land may with a stranger. So, too, circumstances might arise on which an action for use and occupation might be founded. But the defendants here are to show that the plaintiff held under the old lease and on the old terms. *Moss v. Gallimore*, 1 Doug. 279, is inapplicable: there the lease had been made before the mortgage, which therefore was in effect an assignment of the reversion; and notice from the assignee to the tenant was necessary under stat. 4 Ann. c. 16, ss. 9, 10. If *Pope v. Biggs*, 9 B. & C. 245, (17 E. C. L. R.) be correctly reported, it must be admitted that the language of BAYLEY, J., is strongly against the plaintiff in the present case, though the actual decision was on a point which does not arise here. But the doctrine which appears to have been there laid down cannot be supported. The learned judge remarks that a lessee is at

liberty to show that his lessor's title has been put an end to. But, where the mortgage is prior to the lease, the defence amounts to saying that the lessor had no title at the time of the demise. Upon these facts, the only title which the lessor had was one by estoppel, good as between him and his lessee, but not otherwise. The learned judge adds, "There is another rule of law, viz. that the mortgagor cannot dispute the title of the mortgagee." But the question between the mortgagor and the mortgagee would turn, not upon a general principle of law, but upon the effect which the mortgage deed had, had in passing the property from one to the other. And the remarks said to have been made by his Lordship on *Keech, lessee of Warne, v. Hall*, 1 Doug. 21, are inaccurate. He represents that case as showing that, though the lessee, in the case of a lease after mortgage, deny that the mortgagor ever had any interest, he may say that the mortgagor had a defeasible title, and that such title has since been defeated; and, in support of this, he points out that the mortgagee might have evicted the tenant, which would be an answer to an action by the mortgagor for the rent; and that it was not necessary for the mortgagee to bring ejectment, if the tenants were willing to attorn and pay rent. Now, though an actual eviction would be an answer to the mortgagor's action against his tenant, a liability to defeasance by title paramount, existing at the time of the lease, is no answer. And attornment would have no effect: stat. 4 Ann. c. 16, ss. 9, 10, applies only to the case of an assignment of the reversion, not to a claim paramount to the lessor's original title. *Doe dem. Whitaker v. Hales*, 7 Bing. 322, (20 E. C. L. R.), has been questioned by LITLEDALE, J., in *Doe dem. Rogers v. Cadwallader*, 2 B. & Ad. 473, (22 E. C. L. R.); but, supposing it correctly decided, it shows only that a mortgagee may, by his own acts, preclude himself from treating the mortgagor's lessee, under a lease made after mortgage, as a trespasser; not that the mortgagee, by his own act, can make the lessee his tenant under the old lease. The plea in *Alchorne v. Gomme*, 2 Bing. 54, (9 E. C. L. R.) would have been good if the doctrine here contended for by the defendants were correct. There BEST, C. J., points out that the statutes relating to attornment, 4 Ann. c. 16, ss. 9, 10, and 11 G. 2, c. 19, s. 11, have nothing to do with the case. The question also necessarily arose in *Rogers v. Humphreys*, 4 A. & E. 299, (31 E. C. L. R.) the Court laying down the rule as to both cases, of a lease created before the mortgage, and one created after; and they held that, in the latter case, the mortgagee could not distrain on the lessee unless the lessee chose to pay rent to him, and he chose to accept it. The dicta in *Partington v. Woodcock*, 6 A. & E. 690, (33 E. C. L. R.), are also decisive on the point. The mortgagee, though in equity the mortgage is considered only as a pledge, is in law the absolute owner of the estate. It is argued that the mortgagee may adopt the mortgagor's contract. But it has been shown that he may treat the lessee as a trespasser; and can he have an option whether he will treat him as trespasser or tenant? How can a man be a party to a lease, by subsequent ratification, when neither the original lessor nor original lessee contracted with reference to such party? It is impossible to make the mortgagee a party to the covenants and other terms of the original lease. In *Doe dem. Mann v. Walters*, 10 B. & C. 626, (21 E. C. L. R.), the Court clearly considered that a party giving notice to quit on behalf of a landlord must have the

landlord's authority at the time, and that a subsequent recognition is not enough.

Secondly, as to the alleged acquiescence by the tenant. At the time when the rent was due for which the avowry is made, nothing had taken place but the notice. It is impossible to infer from the subsequent transactions between the plaintiff and the mortgagee's executors, an agreement to become tenant to the deceased mortgagee, taking effect by relation, antecedently to the accruing of the rent in question. [Lord DENMAN, C. J. I think you need not press this point: I thought the recognition by payment of rent came to very little; and I was not desired to put it to the jury as evidence of a previous tenancy to the deceased mortgagee.] Besides, to support this avowry, the recognition must be of a tenancy under the terms of the alleged demise by the mortgagee, which cannot be inferred. Nothing can be implied but a new tenancy: that, however, would be no answer to the plaintiff's case here.

Cur. adv. vult.

Lord DENMAN, C. J. now delivered the judgment of the court.

This case was tried before me at the Brecon summer assizes, 1836. It was a case of replevin, the distress having been taken by a mortgagee, who had become such previous to the lease granted by the mortgagor to the plaintiff. The mortgage money being unpaid, the mortgagee gave notice to the tenant to pay him the rent, and distrained on his refusal to do so. Stripped of some immaterial circumstances, the question was thus nakedly raised, whether the tenant of a mortgagor, by virtue of a lease posterior to the mortgage, becomes tenant to the mortgagee as soon as the latter gives him notice that there is a mortgage, and that the money has not been paid. On the authority of *Pope v. Biggs*, 9 B. & C. 245, (17 Eng. Com. Law Reps. 368,) and *Waddilove v. Barnett*, 2 New Ca. 538, (29 Eng. Com. Law Reps. 410,) I was of opinion, at the trial, that this question must be answered in the affirmative. And the language of some of the judges in the former case may be thought to warrant the opinion, though there the question was, whether payments were protected, not whether the relation of landlord and tenant arose. On hearing the case argued, and more reflection, I am however now convinced that, by the mere fact of notice that the mortgage money remained unpaid, the mortgagee cannot forthwith cause the tenant to hold of the mortgagee. I am led to this conclusion by the injustice which I think would result from declaring that he possesses this privilege. As against the mortgagor, he might take possession the moment the condition is broken; but, if he chooses to permit him to retain possession, and to lease the premises, as owner, I think he cannot afterwards tell the lessee that he was deceived, and that the mortgagor was not the owner. The tenant clearly cannot deny his lessor's title, or protect himself against him by paying his rent to any other person. Can the law then permit another to come forward and say, "I am the real owner; and that character was assumed by the mortgagor by my consent: while you thought you were dealing with him, you were in fact dealing with me for the rent you may have already paid to him: I also claim the right to distrain"? The tenant's attornment is at least necessary to create this relation: and we are all clearly of opinion that the subsequent attornment, which was proved in this case, cannot have the effect of setting up the mortgagee's title by relation from the period when notice was given.

Thus far we are agreed: and the rule must be made absolute for a new trial.

But it is proper to state that the delay in giving our judgment has been occasioned, in a great degree, by my own doubt of the soundness of a doctrine which was strongly pressed upon the court in argument, as the medium by which the result must be attained.

This argument was, that the mortgagee may always treat both the mortgagor and all who claim under him as trespassers; and that, for that reason, the mortgagor's lessee cannot become the tenant of the mortgagee. My learned brothers are, I believe, disposed to assent to this proposition, which, generally speaking, is certainly not to be questioned. But, for my own part, I wish to guard myself against being understood to adopt it as universal.

The contrary must, I think, be admitted,—that a mortgagee may so bind himself by his own conduct as to be precluded from treating the mortgagor's lessee as a trespasser: what conduct might amount to a recognition, seems to me to be rather matter of evidence than of law: but I confess that *Doe dem. Whitaker v. Hales*, 7 Bing. 322, (20 Eng. Com. Law Reps. 147,) appears to me, though doubted by my brother LITLEDALE in *Doe dem. Rogers v. Cadwallader*, 2 B. & Ad. 473, (22 Eng. Com. Law Reps. 126,) to be well decided. I am by no means prepared to admit that a jury would not be warranted in inferring a recognition of the tenant's right to hold from the mere circumstance of the mortgagee's knowingly permitting the mortgagor to continue the apparent owner of the premises, as before the mortgage, and to lease them out, exactly as if his property in them continued.

The well-known case of *Keech, lessee of Warne, v. Hall*, 1 Doug. 21, is generally considered as an authority the other way: but Lord MANSFIELD was not there laying down the law upon the subject so much as explaining his own view of the manner in which mortgagor and mortgagee commonly regard one another in fact. I must add that some misconception may have arisen on this subject, from the care the courts have employed in correcting an acknowledged error of the same great judge, the error of supposing that the right to recover in ejectment could depend on any thing but the legal right of possession. This most frequently follows the legal estate; though Lord MANSFIELD was disposed in some cases to transfer it to him in whom no more than an equitable title was vested. A strong assertion of the right of the mortgagee in such a case against the mortgagor may have led to the notion that, as against the former, not only the latter, but all claiming under him, must be wrong-doers, without adverting to the possibility of the right of possession being recognised in another by the person enjoying the legal estate.

Rule absolute for new trial.

GRAVES, CHEESWRIGHT, and LERMITTE, against COLBY.—p. 356.

A company was incorporated, with power to the master, two wardens, and assistants (all chosen from the body of the company,) to make by-laws for the government of the company, and to provide penalties, by fine, for breach of such by-laws; the company to have the fines for their use. A by-law was made, that every one of the livery of the company who should be chosen steward and refuse to take the office, should forfeit 15*l.* to the master and wardens "for the time being, or to one of them, for the use, relief, and maintenance" of the company.

Defendant was chosen steward, and refused to take office. At the time of his election and refusal, G. was master, and C. and L. were wardens.

G., C., and L. brought debt against the defendant upon the by-law, not naming themselves, in the commencement of the declaration, as present or late officers, nor stating that they sued for the use of the company, but alleging the above facts, and that defendant had forfeited and become liable to pay 15*l.* to the master and wardens for the time being, or one of them, to the use, &c., of the company, whereby an action had accrued to plaintiffs, G. so being master, and C. and L. so being wardens, to demand, &c. (not adding to the use, &c., of the company.) Breach, that defendant had not rendered to the plaintiffs or the company.

Plea, that, at the commencement of the suit, G. was not master, nor C. warden. On demurrer, Held, that the action did not lie, the right to sue not remaining in the officers after they had quitted office.

Quære whether the action was maintainable by any one?

DEBT. William Graves, Richard Cheeswright, and James Lermite, by, &c., complain of Joseph John Colby, who has been summoned to answer the said W. G., R. C., and J. L., of a plea that he render to them the sum of 15*l.* of lawful, &c., which he owes to and unjustly detains from them. The declaration set forth letters-patent of 12th June, 2 Ja. 1, incorporating *The masters, wardens, and commonalty of the mystery or art of the Turners in London*, by that title, empowering them to purchase and possess manors, lands, &c., to them and their successors, in fee or for years, &c.; and also goods and chattels, &c., and to give, grant, &c., manors, lands, &c., and to do and execute all and singular other deeds and things by the name aforesaid; and that by the same name they might plead, &c., have a common seal, &c.; and that thereafter, for ever, there might be and should be one of the commonalty of the mystery, &c., in form in the said letters-patent thereunder mentioned to be chosen, who should be, and who should be named, master of the said mystery, &c.; and that likewise there might and should be two of the commonalty of the same mystery, &c., in form, &c., (as before,) who should be, and should be named, wardens of the mystery, &c.; and also that there might be and should be thirteen or more, not exceeding the number of twenty-four, of the commonalty aforesaid, in form, &c., (as before,) who should be named assistants of the aforesaid mystery, &c., and from time to time should be assisting and aiding the same master and wardens for the time being in all causes, matters, and business touching and concerning the said master, wardens, and commonalty; and that it might and should be lawful to the same master, wardens, and commonalty, and their successors, to have a certain council-house, &c.; and that the same master, wardens, and assistants, or the greater part of them, for the time being, as often as it should seem to them to be fit and necessary, might hold within the same house a court or convocation of the same master, wardens, and assistants, and common council, or the greater part of them; and in the same court, &c., treat, confer, consult, provide, and determine of the statutes, articles, and ordinances touching or concerning the commonalty aforesaid, and the good rule, estate, and government of the same; and that the master, wardens, and assistants for the time being, or the greater part of them, (of whom the master and one of the wardens for the time being to be two,) upon public summons thereupon to be made, for that purpose assembled, might and should have full power and authority to constitute, ordain, and make, from time to time, reasonable laws, statutes, ordinances, decrees, and constitutions in writing whatsoever, which to them or the greater part of them, &c., (quorum as before,) according to their sound discretions, should appear to be good, wholesome, &c., for the

good rule and government of the master, wardens, and commonalty, &c., and of all other the turners and all other persons of the aforesaid mystery, &c., within five miles of London, &c.: and that the same master, wardens, and assistants for the time being, or the greater part of them, &c., (quorum as before), so often as they should make, &c., such laws, &c., in form aforesaid, should make, limit, and provide such sort of, and such, pains, punishments, and penalties, by imprisonment of the bodies or by fines and amerciaments, or by either of them, towards and upon all delinquents against such laws, &c., or either or any of them, as and which to the same master, wardens, and assistants for the time being, or the greater part of them, &c., (quorum as before,) should seem to be better, necessary, fitting, and requisite for the observance of the same laws, &c.; and that the same master, wardens, and commonalty, and their successors, might and should be able to have the same fines and amerciaments to the use of the aforesaid master, wardens, and commonalty, and their successors, without the impediment of the King, &c.: all and singular which rights, ordinances, laws, statutes, and constitutions, so as aforesaid to be made, the said late King willed to be observed under the pains in the same to be contained; so that such laws, &c., imprisonments, fines, &c., be reasonable, and not repugnant nor contrary to the laws, customs, or rights of the kingdom of England. The charter then, as set out in the declaration, appointed the first master, wardens, and assistants, and provided for the election of their successors.

The declaration further alleged the acceptance of the letters-patent; and that, after the acceptance, to wit, on 3d June, 1823, at the Guildhall of the said city of London, and within the said city of London, the greater part of the then master, wardens, and commonalty of the said mystery, &c., (setting out the performance of the requisites in the charter for making by-laws,) did there, according to the powers granted to them by the said letters-patent, and by force of the same, constitute, ordain, and make certain reasonable laws and ordinances in writing, for the good rule and government of the master, wardens, and commonalty of the said mystery, &c.; by one of which ordinances it was ordained that every person, being of the clothing or livery of the said mystery, &c., who should be thereafter chosen to be steward of the said mystery, &c., and should neglect or refuse to take on him the execution of the said office, should forfeit and pay to the master and wardens of the said mystery, &c., for the time being, or to one of them, for the use, relief, and maintenance of the said mystery, &c., 15*l.* of lawful, &c., which said ordinance, and the said fine therein mentioned, being reasonable, and not repugnant, &c., nor contrary to the laws, statutes, customs, or rights of the kingdom of England, or of the united kingdom, &c., nor to any of the customs or usages of the city of London, afterwards, &c., (approbation by Lord ELDON, C., Sir C. ABBOTT, C. J. of K. B., and Sir ROBERT DALLAS, C. J. of C. P.;) of all which said premises, &c., the defendant afterwards, to wit, on, &c., had notice. Averment, that afterwards, to wit, 16th May, 1833, a convocation, &c., was held, (for electing a steward for the year then next ensuing;) at which convocation the defendant, being of the livery, &c., and a fit and proper person, was, &c., (setting out defendant's election to be steward for the next year, notice thereof to him, and that he was duly required to take upon himself the execution of the office, and refused;) by means whereof the defendant forfeited and became liable to pay to the master and wardens

of the said mystery, &c., for the time being, or one of them, for the use, relief, and maintenance of the said mystery, &c., the sum of 15*l.* above demanded. Averment, that, at the time the defendant was so chosen, &c., and at the time he so refused, &c., Graves was master, and Cheeswright and Lermite were wardens, duly elected, &c., (setting forth the requisites according to the charter;) of all which premises, (notice to defendant. Whereby an action hath accrued to the said plaintiffs, the said W. Graves so being master, and the said R. Cheeswright and J. Lermite so being wardens, of the said mystery, &c., to demand and have of and from the defendant the said sum of 15*l.* so forfeited as aforesaid, and above demanded. Yet defendant, although often requested, hath not as yet rendered the said sum of 15*l.* above demanded, or any part thereof, to the plaintiffs or any of them, or to the said master, wardens, and commonalty, &c., or any of them, but to pay the same, &c., (refusal:) and the same still is and remains wholly due and unpaid. And thereupon the plaintiffs bring suit, &c.

Second plea. That, at the time of the commencement of this suit, the said plaintiff W. Graves was not, nor is he, the master of the said mystery, &c.; and the said plaintiff R. Cheeswright was not, nor is he, the warden of the said mystery; nor were nor are the said plaintiffs entitled to maintain their said action against the said defendant in this behalf: and this, &c. Verification.

Replication. That, at the time the defendant was so chosen to the said office of steward of the said mystery, &c., and at the time he so refused to take upon himself the execution of the said office, the said W. Graves was master of the said mystery, &c., and the said R. Cheeswright was warden of the said mystery; and that the plaintiffs are entitled to maintain their said action against the said defendant in this behalf: and this, &c. Conclusion to the country.

General demurrer. Joinder.

The demurrer was argued in Hilary term last.(a)

Gurney, for the defendant. The plaintiffs will probably object to the plea: and the defendant insists that the declaration is bad. First, the by-law, in terms, gives the forfeiture to the master and wardens "for the time being." That means, not the master and wardens at the time of the incurring of the forfeiture, but at the time when it is enforced; for it can be enforced only by the parties who are entitled to it. Thus, by stat. 54 G. 3, c. 170, s. 8, securities given for the maintenance of bastard children are vested in the overseers "for the time being," who may sue upon them by the description of overseers; and the action is not to abate by a change of overseers; but to be proceeded in by the overseers "for the time being" as if no such change had taken place; and under this clause it was held, in *Addey v. Woolley*, 8 Taunt. 691, (4 E. C. L. R.,) S. C. 3 B. Moore, 21, (4 E. C. L. R.,) that the action must be brought by the overseers in office at the time of commencing the action, though they be not the overseers to whom the security was given. In *Doe dem. Higgs v. Terry*, 4 A. & E. 274, (31 E. C. L. R.,) notice to quit was given to tenants from year to year of parish property, under stat. 59 G. 3, c. 12, s. 17, by the then churchwardens and overseers; and afterwards their successors brought ejectment, and recovered. Here, therefore, if any persons were entitled to sue, the action should have

(a) Tuesday, January 16th, 1838. Before Lord Denman, C. J., Littledale, Williams, and Coleridge, Js.

been brought by those who were officers at the time of commencing the action; though it is not incumbent on the defendant to show that there is any party who can maintain the action. And, secondly, if the effect of the by-law is to give the forfeiture to those who were master and wardens at the time when the forfeiture accrued, the by-law is bad. It is clear that a by-law reserving a penalty to strangers is void, on a principle analogous to that which prevents the assignment of a chose in action. A corporation, without any by-law, may sue in case for breach of a custom; *Corporation of Colchester v. Simpson*: (a) but a by-law giving a stranger the penalty for the breach is invalid; *Bodwic v. Fennell*, 1 Wils. 233. The only exceptions to this latter rule are in the cases of the chamberlains of London and Bristol; *Chamberlain of London's Case*, 5 Rep. 62 b, *Hollings v. Hungerford*. (b) But the chamberlains of London and Bristol are each a corporation sole; and in *Hollings v. Hungerford*, it was said "that *camerarius ex vi termini* signifies the *treasurer* of the corporation;" and the Court "declared that he recovered for the benefit of the corporation," and that they would "take notice of the relation there is between the *chamberlain* and the *corporation*, and that he is no *stranger*, but (as it were) part of the *corporation*." In *Bodwic v. Fennell*, DENNISON, J., said, "I am not for carrying the right to sue, further than the *chamberlain* of a *corporation*, as in *Hollings v. Hungerford*." It is clear that an action by a late chamberlain would not have been held to lie. In *Totterdell v. Glazby*, 2 Wils. 266, it was held that a by-law of the corporation of Bath was bad, which gave a penalty to a guild and company of tailors, though free of the corporation: here no present connexion of any kind appears between the plaintiffs and the corporation.

Sir W. W. Follett, contra. As to the objection to the by-law, a corporation may, by their by-law, give a fine to a stranger for the use of the corporation. This was not disputed in *The Master, Wardens, and Commonalty of Feltmakers v. Davis*, 1 Bos. & Pul. 98; though there were, in that case, other grounds for the decision. This is a convenient way of imposing the penalty; and the validity of it is established by the admitted instances of the chamberlains of London and Bath. In *Totterdell v. Glazby*, it appears that the penalty was not reserved to the use of the corporation. In Willcock's Law of Municipal Corporations it is said (p. 156, § 375), "If the injury be to a particular company, as where the custom excludes foreigners from the practice of a particular trade, or from the practice of the trade of a certain company, as well freemen as foreigners, unless free of that company, the penalty of the by-law ought not to be given to the municipal corporation or their officer, but to the company injured, or their treasurers in trust for them." For this *Mayor of Winton v. Wilks*, 2 Ld. Raym. 1129; *Woolly v. Idle*, 4 Bur. 1951, and *The Mayor of York v. Welbank*, 4 B. & Ald. 438, (6 E. C. L. R.,) are cited; and it is added, "Sed vide *Tailors of Bath v. Glazby*." (c) The principle seems to be that it is sufficient if, as here, the action be brought by parties really suing on behalf of those interested. In *Bodwic v. Fennell*, 1 Wils. 233, the party suing did not appear to be connected with the corporation, and sued for himself: the penalty

(a) Cited in *Bodwic v. Fennell*, 1 Wils. 237.

(b) Cited in *Bodwic v. Fennell*, 1 Wils. 235.

(c) *Totterdell v. Glazby*, 2 Wils. 266. See, further, Willcock's Law of Mun. Corp. pp. 86, 87, ss. 184, 185.

was reserved to any person that would sue for it. *Ellington v. Cheney*(a) rests upon the same principle. Then, next, assuming the by-law to be valid, the proper parties to sue are the parties in office at the time of the forfeiture; for it is then that the right of action vests. If the action had been brought immediately upon the penalty accruing, there could have been no doubt that it was properly brought; but, in such a case, would the action abate, or a fresh party be substituted as plaintiff, at the expiration of the year of office? [COLERIDGE, J. What would happen if the plaintiff died?] His executors might sue; if not (and some authorities deny it), the action would be at an end. *Addey v. Woolley* was decided upon the language of the statute, which vests the security in the parties who are in office "for the time being." [COLERIDGE, J. The situation of the master and wardens of a company is very different from that of the obligee of a bond.] At common law the obligee would have been the party to sue. *Doe dem. Higgs v. Terry* was decided on a similar statutory provision.

Gurney, in reply. *Addey v. Woolley* and *Doe dem. Higgs v. Terry* show the legal interpretation of the words "for the time being," which is the expression of the statute in each of those cases, and of the by-law here. The by-law is defended on the ground that the penalty is reserved for the use of the company. If so, the declaration is bad; for the plaintiffs do not sue for the use of the company, or in any other than a natural capacity. [LITLEDAL, J. Towards the end of the declaration it is said that the defendant became liable to pay to the master and wardens for the time being, for the use, &c., of the mystery.] But the action is not so brought. In *The Master, Wardens, and Commonalty of Feltmakers v. Davis*, 1 Bos. & Pul. 98, the action could not be brought by the company, because the penalty was not reserved to them. But it does not appear that the by-law was good: the Court say that the objection decided on was but one of many. The terms of the charter in *Ellington v. Cheney* do not appear; perhaps it reserved power to the corporation to sue in the name of the master. No instance can be found of an action by a former chamberlain or his executors, even in the cases of London and Bristol. The declaration must fail on any view of the case; for the parties suing are strangers. If the by-law reserve the penalty to strangers, it is invalid; if not, the plaintiffs are not within the by-law.

Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the Court.

It is not disputed that the subject-matter of the by-law, as confirmed by the Lord Chancellor and two Chief Justices, is legal. But the objections to the action are, first, that, as the charter directs that the master, wardens, and commonalty of turners shall have the fines and amerciaments for the breach of the by-laws to the use of the master, wardens, and commonalty, the fine ought to have been directed to be paid to the master, wardens, and commonalty, and not to the master and wardens of the mystery or art, though it be expressed to be paid for the use, relief, and maintenance of the mystery or art. The next objection is that, supposing the by-law to be valid as far as relates to the penalty being to be paid to the master and wardens of the mystery or art for the use, relief, and maintenance of the mystery or art, yet the action ought not to be brought by the present plaintiffs, who, though they were the master and wardens when the penalty became forfeited, yet had ceased

(a) Cited in *Bodvic v. Fennell*, 1 Wils. 285.

to be so before the action was brought. And that the action, if maintainable at all, should now be by the corporate body at large, or else by the persons who were the master and wardens when the payment was sought to be enforced by bringing the action.

As to the first objection, we think that a by-law made by a corporation cannot direct the payment to be made to a stranger to the corporation, with the exception, indeed, that it may be made payable to the chamberlain, who is considered as the treasurer of the corporation, and which therefore is in effect making it payable to the corporate body itself, because he is the officer whose duty it would be to receive the money, and to take care of it when so received. This appears from the case of *Bodwic v. Fennell*, 1 Wils. 233, where the penalty was given to any person who would sue for it. The case underwent much consideration: and the Court gave judgment "that although a body politic has power to make a by-law to enforce a penalty for breach of a custom, yet they cannot give an action to recover that penalty to a stranger, but the corporation themselves, or somebody for them (as the chamberlain in the case of the city of London), must sue" for it. "If the law were otherwise it would be very inconvenient, it would be like assigning a chose in action, which the policy of the law will not endure." In the course of the argument some cases were cited which established the principle, with the exception as to the chamberlain. The case of *Hollings v. Hungerford*,^(a) 3 G. 1, was debt on a by-law for the recovery of a penalty by the chamberlain of Bristol: the by-law was made under a power in their charter to make by-laws with penalties to be recovered for the use of the corporation. An objection was made that the chamberlain was a stranger to the corporation, a stranger to the right, and, therefore, a stranger to the remedy; but it was held that the action was well brought, and that *camerarius ex vi termini* signifies the *thesaurarius* of the corporation: and they declared that he recovered for the benefit of the corporation, and the Court would take notice of the relation there is between the chamberlain and the corporation; and that he is no stranger, but, as it were, part of the corporation.

In *The Chamberlain of London's Case*, 5 Rep. 62 b, it was considered that a penalty might be payable to the chamberlain of London. And so also in *Bosworth v. Herne*, Ca. K. B. temp. Hardw. 405, S. C. 2 Str. 1085, an action for the penalty of a by-law was brought by the chamberlain of London. In *Mayor of Bedford v. Fox*, 1 Lutw. 562, a penalty was made payable to the chamberlain of Bedford, and no objection on that account. In *Hesketh v. Braddock*, 3 Bur. 1847, a penalty was made payable to the treasurers of Chester. The case of *Totterdell and Harris, Masters of the Taylors' Company at Bath*, v. *Glazby*, 2 Wils. 266, is a very strong one to show that a penalty cannot be made payable to a stranger. The by-law was made by the corporation of the city of Bath, in which city there was a guild and company of tailors free of the city, and two masters for the government thereof, and a custom that none should exercise the trade of a tailor within the city, unless he was free of the trade and city: and a by-law was made by the corporation of the city imposing a penalty of 8s. 4d. a day upon any one exercising the trade, not being free thereof, to be levied by distress, or recovered by action of debt, by the masters of the company for the time being, for the use of the poor of the company of tailors. The Court held the by-

(a) Cited in *Bodwic v. Fennell*, 1 Wils. 235.

law was a bad one, because these tailors are not the corporation of Bath, and therefore the by-law is ill in giving the action to the master of the tailors' company for the time being, who are strangers to the corporation of Bath: for to give it to anybody else is like assigning a chose in action, which the policy of the law will not allow. And this case is the stronger, because the penalty was made payable to the persons for whose benefit, in trust for the poor of the company, the penalty was to be applied. At the same time, if the doctrine of this case were necessary to support the judgment we are about to pronounce, we should pause a little; for it is very extraordinary that in little more than two years after this decision in the Common Pleas, which was in Trinity term 5 G. 3, a case was decided in the King's Bench, in Michaelmas term 7 G. 3, by the name of *Woolley v. Idle*, 4 Bur. 1951, where the plaintiffs were the masters of the fellowship and company of merchant tailors of the city of Bath, for a penalty under the very same by-law, at least as far as appears; and judgment for the plaintiffs on demurrer, Lord MANSFIELD saying there was no doubt. It is very true, the question there was solely upon the validity of the custom, and no objection made to the by-law, as in the case in *Wilson*; (a) but the extraordinary part of the case is that in little more than two years the masters of the same company should have thought of bringing an action on a by-law which had been held bad, and that the defendant should not have raised the objection; because the circumstances of the former decision must have been well known, one would suppose, amongst the persons most interested.

But we are to consider, in the case before us, whether the penalty, being made payable to the master and wardens for the use of the company, is bad on that account. The master and wardens are not strangers to the company, for they are the two chief integral parts of the corporation. It is to be observed that, in the case of *Ellington v. Cheney*, 9 G. 2, cited by Mr. Justice DENNISON in *Bodwic v. Fennell*, 1 Wils. 235, it was held that a custom to exclude foreigners was good, and that a by-law with a reasonable penalty to support such custom is good, where the penalty is given to the corporation or guild. A by-law was made that, if a person should follow the trade of a shoemaker, not being free, he should forfeit a certain penalty, to be recovered by the master of the guild. The master brought the action; and the judgment was affirmed on a writ of error; and, if the penalty could be paid to the master, who was the head of the company, why should it not be good if it was to be paid to the master and wardens, who are the two head integral parts of the corporation?

And, in the case of *The Master, Wardens, and Commonalty of Felt-makers v. Davis*, 1 B. & P. 98, the master, wardens, and assistants had a power by the charter to make by-laws. A by-law was made, imposing a penalty upon any person who refused to take upon himself the office of renter warden, to be paid to the master and wardens for the time being for the use of the master, wardens, and company. The first count stated everything specially: the second count was general, and specially demurred to; and one of the grounds of demurrer was, that the forfeiture is stated to have been incurred to the master and wardens, whereas the master and wardens are not the plaintiffs in the action. Lord Chief Justice EYRE, in giving the judgment of the Court, says, "The forfeiture in question is to be paid to the master and wardens, to the use of the

(a) *Totterdell v. Glasby*, 2 Wils. 266.

master, wardens, and company. If the by-law is badly framed, it is the fault of those who framed it. If they have chosen to empower their master and wardens to sue, the court cannot look any further: no regulation with respect to the payment of the money by them to any other persons will vary the right of action." "The master and wardens may bring the action, and apply the money to the use of the company. They may sue in the same manner as the chamberlain of London does for the corporation of London: and they would probably declare both in their natural and official capacities." The count was held bad for this, amongst other, objections. It does not appear from the report whether the charter, empowering by-laws, stated that the master, wardens, and commonalty should have the fines, as in the case now before us: however, the Court of Common Pleas does not say that the by-law is bad by directing the penalty to be paid to the master and wardens. And, taking all these authorities together, we are not prepared to say that the by-law now under consideration is bad for directing the penalty to be paid to the master and wardens for the use of the master, wardens, and company.

Then, supposing there be no objection to the by-law itself, the next question is, is the action well brought in the name of the present plaintiffs?

The penalty is to be paid to the master and wardens *for the time being*. It may be asked, what is the meaning of these words? Is it to those who were master and wardens when the penalty was incurred, or those who were master and wardens when payment was endeavoured to be enforced?

Stat. 54 G. 3, c. 170, s. 8, enacts that securities given for indemnifying the district or parish as to bastard children are declared to be vested in the overseers of the poor for the time being; and, in the case of *Addy v. Woolley*, 8 Taunt. 691, S. C. 3 B. Moore, 21, where an action was brought by the overseers of the poor to whom a bond was given for indemnifying the parish, and the defendants pleaded that the plaintiffs were not overseers at the time of the commencement of the action, the plea was held good, and that the action could not be brought in the name of the overseers to whom the bond was given. We do not cite this case as an authority to show that the present plaintiffs cannot maintain the action, but to show in what way the Court construed the words *for the time being*, which is "those who were such when the action was commenced."

This case, however, is not within either stat. 54 G. 3, c. 170, or stat. 59 G. 3, c. 12, s. 17, which has been referred to in the argument in citing the case of *Doe dem. Higgs v. Terry*, 4 A. & E. 274; as those acts are confined to parish officers who are authorized by these respective statutes to sue and hold property as if they were corporations.

In considering the effect of the decisions that a by-law cannot reserve a penalty to be paid to a stranger: they are some of them as to penalties given to whoever will sue; but it may be said that masters and wardens are not to be considered in that light, but they are integral parts of the corporation, and therefore may sue: and so perhaps they may, while they fill that situation; but they were not so at the time of the action brought; and, for anything that appears, they did not then belong to the corporation in any character whatever, and may be strangers; and, therefore, if the by-law was so framed as to allow them to sue now, it

would be authorizing persons who may be strangers to the corporation to sue for the penalty. It may be said they would be trustees for the corporation; but it is much more expedient that penalties should be sued for, either by the corporation at large, or by persons who are connected with it, and not to allow persons who may stand in the relation of trustees only to have anything to do with it.

It may be said, however, that there was a right of action once vested in the plaintiffs by the defendant refusing to execute the office; and it may be compared to a bond given to the churchwardens and overseers to indemnify the parish: in which case, before stat. 54 G. 3, c. 170, the action would be brought in the name of the churchwardens and overseers to whom the bond was given, though they were out of office when the action was brought. But that case differs from this: in these parish bonds the defendant personally enters into a contract by bond with the churchwardens and overseers, by their individual names of A. B. and C. D., &c., though they are also described as churchwardens and overseers; but here is no contract, but the defendant is a wrongdoer, and subject to a penalty, not to be paid to the plaintiffs, or any other person by name, but to the master and wardens in their character official and politic: their right to receive the money, or to bring an action on non-payment, only belongs to them in their official and politic character; and, when that ceases, their right to receive the money and to bring an action ceases with it. And we are of opinion that they cannot maintain the present action, and that there must be judgment for the defendant.

We give no opinion, whether the corporation at large, or the present master and wardens, could maintain an action. According to the opinion of Lord Chief Justice EYRE, in delivering the judgment of the Court in *The Master, Wardens, and Commonalty of Feltmakers v. Davis*, 1 B. & P. 98, the corporation at large could not maintain it; and, as to the present or any future master and warden maintaining it, the objection seems to be that, to do so, they must take in succession in the nature of a corporation. The chamberlain of the city of London is a special corporation sole for some purposes; and there is a custom in London that several things in which he has acquired an interest shall go to his successors, who have the same right to proceed upon them as he had; in *Byrd v. Wilford*, Cro. Eliz. 464, it was so held; and other cases were there cited as having been decided to the same effect; and so also in *Fulwood's Case*, 4 Rep. 64 b. It would, however, be very difficult to apply the same rule to the master and wardens of this company.

And, if the circumstances of this case are such that the defendant is not now liable to anybody, it is the fault of the corporation in not making the by-law conformable to the charter, or in not bringing their action earlier.

Judgment for defendants.

HUTCHINSON and Another, Assignees of HUNT, a Bankrupt, against
HEYWORTH and Others.—p. 375.

H., a manufacturer, had been accustomed to consign goods by the agency of O. and Co., commission merchants, to houses in America, for sale on H.'s account. O. and Co. made advances to H. on the consignments, received the proceeds as his agents, and accounted to him, repaying themselves their commission, advances, and other charges. In 1831, H., being indebted to O. and Co. for such advances and charges, and likewise owing 5000*l.* to his own bankers, wrote to O. and Co., authorising them, after paying themselves their balance out of the net proceeds of H.'s shipments down to that date, to pay R. and Co., the bankers, half the remainder of such proceeds, so that the payment should not exceed 5000*l.* O. and Co. thereupon wrote to R. and Co., stating that they, agreeably to H.'s authority, engaged to pay R. and Co. (after liquidating their own balance) a proportion of the remaining proceeds, &c. (as in H.'s letter,) in consideration of R. and Co. guaranteeing O. and Co. from claims by any other party in consequence of such payment. R. and Co. then wrote to O. and Co. that, understanding from H. that O. and Co. had agreed to pay any surplus balance, &c. (as in H.'s letter,) they, R. and Co., agreed to guarantee O. and Co. against such other claims. A few days before this correspondence, H. had transmitted to O. and Co. a letter of authority resembling that afterwards sent, and had seen a draft of a letter from them to R. and Co., like that afterwards sent by O. and Co. to R. and Co., claiming a guarantee as above: but this first authority was revoked, and never acted upon. In 1833 H. became bankrupt. The assignees gave O. and Co. notice not to make any payments out of H.'s effects, except to them. Afterwards O. and Co. received proceeds of sales from the houses abroad, and paid them over to R. and Co. according to the authority given by H. The assignees sued O. and Co. for the amount as money had and received to their use: Held,

1. That the letter of H., acted upon by O. and Co., did not need a bill stamp under stat. 55 G. 3, c. 184., sched. part 1. tit. Inland Bill, since it neither required payment to bearer or order, nor was delivered to the payee, or any person on his behalf. For
The schedule means a delivery either personally to the payee, or to his agent or representative, and not to the person on whom the order is made.
2. That, if the letter had been so delivered, the sum payable was sufficiently specified or ascertainable to bring it within the schedule as an order for payment of money out of a particular fund which may or may not be available, &c.
3. That the transaction between H., O. and Co., and R. and Co., was either a valid appropriation, or equitable assignment, of funds to the amount of 5000*l.* in favour of R. and Co., and was not revoked by H.'s bankruptcy.

ASSUMPSIT for money had and received. Pleas: 1. Non assumpsit.

2. Payment before action brought. 3. A payment into Court. On the trial before Lord ABINGER, C. B., at the Liverpool summer assizes, 1835, a verdict was found for the plaintiffs, subject to the opinion of this Court on the following case.

The action was brought by the plaintiffs as the assignees of Hunt, to recover 5000*l.* and interest. The bankrupt, William Hunt, is the surviving partner of the firm of Hunt & Jenkinson, woollen manufacturers at Rochdale. The defendants are commission merchants and agents at Liverpool, under the firm of Ormerod Heyworth & Co. For many years preceding the bankruptcy, Hunt & Jenkinson had been in the habit of consigning their manufactured goods through the defendants to certain mercantile establishments in America, which are mentioned in the letters hereinafter set out, and which had been recommended to them by the defendants for sale on account of Hunt & J., and to an immense amount; and, by the course of dealing between the parties, Ormerod Heyworth & Co. made advances to Hunt & J. upon such consignments. The proceeds of the sales were to be remitted by the foreign houses to the defendants in Liverpool, on account of, and as the agents of, Hunt & J.; and the defendants were to account for the same to Hunt & J. after repaying themselves thereout their commission, advances, and other charges. The defendants were partners in each of those foreign establishments; but the foreign partners in those

foreign houses were not partners in the house of Ormerod Heyworth & Co.

This course of dealing continued for upwards of twelve years, the proceeds of all sales being regularly remitted to the defendants, who regularly advised Hunt & J. thereof, and placed the same to their credit, or paid over the amount, as circumstances required; and the defendants made up and balanced and regularly transmitted to Hunt & J., and to Hunt after Jenkinson's death, and to the plaintiffs after Hunt's bankruptcy, their accounts current of all the said transactions, half-yearly, up to every 30th June and 31st December, which have been regularly approved of, except as to the 5000*l.* in question and interest thereon. No consignments were made after 30th September, 1831. At that time the amount of Hunt & J.'s goods shipped abroad through the defendants, and unsold, was from 39,000*l.* to 40,000*l.*; and the amount of remittances received by the defendants subsequent to September, 1831, on account of consignments previous thereto, is about 43,500*l.* Hunt & J. were at that time indebted to the defendants in a large sum, for advances in anticipation of sales, and for commissions and charges. Hunt & J. had also then become indebted in upwards of 5000*l.* to Clement Royds & Co., of Rochdale, their bankers, which debt remained unsatisfied until the time of the payment of 5000*l.* to Royds & Co., as after mentioned. On 23d September, 1831, Hunt & J., being so indebted as aforesaid, wrote and sent the following letter to the defendants.

Liverpool, September 23d, 1831.

Messrs. Ormerod Heyworth & Co.

Gentlemen,—We hereby give you authority to pay to Messrs. Royds & Company, bankers, Rochdale, after you have paid yourselves the balance we owe you, from the net proceeds of our shipments to your foreign establishments up to the present date, one half of the remainder of the proceeds of said shipments. We remain, &c.

Hunt & Jenkinson.

In answer to which the defendants, on the same day, sent to Hunt & J., the following enclosed in another letter.

Messrs. Royds & Co., bankers, Rochdale.

Gentlemen,—We have this day received an authority from Messrs. Hunt & Jenkinson to pay you, after we have liquidated the balance they owe to us from the first proceeds of their shipments to our foreign establishments up to the present date, one half of the remainder of the proceeds of the said shipments, which at a moderate estimate we think will amount to about 4700*l.* This authority we engage to comply with, on the condition of your guaranteeing us from any claim which may be made on us by any other party in consequence of such payment having been made to you. We remain, &c.

Ormerod Heyworth & Co.

On 28th September, 1831, Hunt & J. wrote and sent the following letter to the defendants.

Liverpool, 28th September, 1831.

Messrs. Ormerod Heyworth & Co.,

Gentlemen,—Your letter to Messrs. Royds & Co., of the 23d instant, enclosed in yours of the same date, we did not present to them, thinking it would not be satisfactory; and, having returned to you the same, we now authorize you to pay to Messrs. Royds & Co., (having revoked the former order in their favour,) after you have paid yourselves the balance

we owe you from the net proceeds of our shipments to your foreign establishments to the present date, one half of the remainder of the proceeds of said shipments, provided the same shall not exceed the sum of 5000*l*. We remain, &c.

Hunt & Jenkinson.

The defendants on the same day wrote and sent the following letter to Royds & Co.

Liverpool, 28th September, 1831.

Messrs. Royds & Co.

Gentlemen,—We refer to ours of the 23d instant, which has been returned to us by Messrs. Hunt & Jenkinson, not being satisfactory to them, which we now revoke. We therefore now, agreeably with their authority, engage to pay you, after we have liquidated the balance they owe to us from the first proceeds of their shipments to our foreign establishments up to the present date, a proportion of the remainder of such proceeds as may come into our possession, which we expect will be to a considerable amount, so as not to exceed the sum of 5000*l*. in consideration of your guaranteeing us from any claim which may be made on us by any other party, in consequence of such payment having been made to you. We remain, &c.

Ormerod Heyworth & Co.

They received the following answer from Royds & Co.

Messrs. Ormerod Heyworth & Co.

Gentlemen,—Understanding from our friends, Messrs. Hunt & Jenkinson, that you have agreed to pay over to us one half of any surplus balance arising from the proceeds of goods consigned to your foreign establishments up to this date after liquidating your claims against them, we hereby agree to guarantee you from any claim which may be made on you from any other party in consequence of such payments.

Clement Royds & Co.

Rochdale, 30th September, 1831.

At the trial, the above letters of Hunt & J. to the defendants were produced to show the authority of Hunt & J., and were objected to as not properly stamped, the only stamp being an agreement stamp of 1*l*. 15*s*. on the letter of 28th September, 1831, for all the letters. This point was reserved.

In February 1833, Hunt, the then surviving partner, committed an act of bankruptcy; and on 7th March 1833 the fiat in bankruptcy issued, under which Hunt was declared bankrupt, and the plaintiffs were chosen assignees. On 15th April following, the plaintiffs served a notice on the defendants not to make any payment out of the bankrupt's effects then in their hands, or which might thereafter come into their hands, to Royds & Co., or to any one else but the plaintiffs. The defendants, however, subsequently, in pursuance of the alleged authority and engagement contained in the letters above stated, paid Royds & Co., the sum of 5000*l*., which had been received by the defendants after the service of the above notice. The defendants have paid the plaintiffs, and paid into Court under the plea for that purpose in this cause, all the proceeds of the consignments received by them, excepting that sum, which does not exceed one half of the remainder of those proceeds after satisfying the defendants the balance due to them at the time of the bankruptcy, which was liquidated prior to the receipt by the defendants of any part of that

5000*l.* The payment into Court also covered the plaintiffs' claim for interest on the 5000*l.*

The question for the opinion of the Court was, whether the plaintiffs were entitled to recover the 5000*l.*, under the circumstances stated. If the Court should be of that opinion, the verdict was to stand; otherwise, a nonsuit to be entered. The case was argued in last Easter term.^(a)

Cresswell for the plaintiffs. First, the letter from Hunt & Jenkinson, of September 28th, was not duly stamped; and, if so, the defendants had no legal authority to pay over the 5000*l.*, and the prima facie claim of the plaintiffs as assignees must prevail. That letter should have been stamped as a bill of exchange, according to stat. 55 G. 3, c. 184, Sched. Part I., under the head of Inland Bills, "where the total amount of the money thereby made payable shall be specified therein, or can be ascertained therefrom." Certain instruments are there enumerated, which "shall be deemed and taken to be inland bills;" and, among them, "all bills, drafts, or orders for the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen, if the same shall be made payable to the bearer, or to order, or if the same shall be delivered to the payee or some person on his or her behalf." Here the letter from Hunt & Jenkinson, of September 28th, was an order for 5000*l.* or so much less as the proceeds in question should amount to. In *Emly v. Collins*, 6 M. & S. 144, an order for the payment of certain sums out of the proceeds of an intended sale was held to require stamping as an inland bill. It was objected there, that the order was, in its terms, a direction, not only to pay money, but to do a collateral act, namely, to take a receipt: the Court, however, thought that was not its effect; nor, in the present case, is any collateral act required. In *Firbank v. Bell*, 1 B. & Ald. 36, a bankrupt whose assignees were the plaintiffs, wrote to the defendants, before his bankruptcy, requiring them, when certain mahogany belonging to the bankrupt was sold, to pay Pease & Co. 1500*l.* in such bills as defendants should receive from the sale. Some other letters were in evidence; and the defendants urged that the whole constituted an agreement: and one of the documents was stamped accordingly. But Lord ELLENBOROUGH said, "There is nothing to which the name of an agreement can be given if you do not pray in aid the order; that is the only thing by which the bankrupt is personally implicated; for he is not a party to the other letters. The order alone affects the bankrupt, and that amounts to nothing more than an order for payment. It falls then within the description of the act of parliament, viz. an order for the payment of money out of a fund which may or may not be available. It was the object of the legislature in framing this provision to treat as promissory notes and bills of exchange, and to subject to a stamp duty such instruments as, being payable on a contingency or out of a particular fund, could not in strictness fall under that denomination." Those observations apply to the present case. The engagement of the defendants to pay Royds & Co. was in consideration of their guarantee: the authority to pay was no part of any agreement under which that payment was made. In *Butts v. Swann*, 2 Brod. & B. 78, (6 E. C. L. R.,) which nearly resembled the last cited case, there was a similar decision. *Jones v. Simpson*, 2 B. & C. 318, (9 E. C. L. R.,) may be referred to; but there the order

(a) May 1st. Before Lord Denman, C. J., Littledale, Patteson, and Coleridge, Ja.

was, please to pay N. "the proceeds of a shipment of twelve bales of goods, value about 2000*l.*, consigned by me to you." That was held not to require a bill stamp; but the order there was for no specific amount; as ABBOTT, C. J., observed, no sum was specified, or could be ascertained from the instrument: there were no means of fixing the amount of duty to be imposed. [LITLEDALE, J. Here the letter of September 28th did not make the sum "payable to the bearer, or to order;" was it "delivered to the payee, or some person on his" "behalf?"] It was delivered to the defendants for the payees' use. Where the order conclusively affects a fund in the hands of the person to whom it is addressed, for the benefit of a third party, it must be stamped as a bill: not so if it merely gives a revocable authority in his favour. [PATTERSON, J. It does not appear that the letter of Hunt & Jenkinson ever reached the payees: all they received was a letter from the defendants, with a conditional assent to pay over certain proceeds to the use of Royds & Co.] As soon as the communication was made to the parties interested, that the defendants had the order, and would pay the amount specified, it was an order on the fund referred to, for the use of the payee. [LITLEDALE, J. The expression that an instrument shall be delivered on the behalf of another, seems to imply that it belongs to that other, and is to be handed over when he calls for it. Here, the order was not meant to come into the hands of Royds & Co. [COLERIDGE, J. The defendants would have a right to hold it as their voucher.] They would not need that protection unless they paid the money. Royds & Co. were the parties beneficially interested: the defendants could have no right to hold the order but on their behalf; and they did, after the arrangement resulting from the several letters, hold it for the use of Royds & Co. There was nothing in the transaction calculated to give the defendants a lien which they had not before. It was as if a bill of exchange, drawn on the defendants in favour of Royds & Co., had come to the hands of the defendants in the ordinary way, and they had said to Royds & Co., we have received a bill in your favour, which we accept: Royds & Co. would clearly have been entitled to that bill.

Supposing, however, that nothing was given which legally amounted to a bill, but that Ormerod Heyworth & Co. received a simple authority from Hunt & Jenkinson to pay Royds & Co., that authority was revoked when Hunt became bankrupt; and, before any part of the 5000*l.* came to the defendants' hands, the assignees had given them notice not to pay it over. The partners in the foreign houses were not partners in the firm of Ormerod Heyworth & Co; the order, therefore, received by this firm from Hunt & Jenkinson would not bind any sums in the hands of the firms abroad. When the order was made, no new consideration had arisen for the giving it; the making such order was no part of any original transaction out of which a debt arose from Hunt & Jenkinson to Royds & Co. In *Fisher v. Miller*, 1 Bing. 150, (8 E. C. L. R.) the defendant, as agent and by order of Chesmer, a bankrupt, paid over 500*l.*, the proceeds of a cargo, to creditors of Chesmer, which proceeds were afterwards claimed from the agent, but held not to be recoverable by Chesmer's assignees. But there the creditors had advanced 500*l.* to the bankrupt, on a promise that the proceeds of the particular cargo should be appropriated to the discharge of this debt. In *Bradbury v. Anderton*, 1 Cro. M. & R. 486, S. C. 5 Tyr. 152, the bankrupt, whose assignees were plaintiffs, sold goods to the defendant; the latter, instead

of paying the price, gave credit for the amount to two persons who were his debtors, and creditors of the bankrupt, by agreement among all the parties; and it was there held that, if an irrevocable appropriation of the purchase-money to the two creditors formed a part of the contract of purchase, the assignees (who sued for the purchase-money) could not dispute the appropriation. Here no such original appropriation took place: Nor can the present case rank with those which turn upon the principle that where A. owes B. an ascertained sum, and is creditor to C. in the same amount, and the several parties agree that C. shall pay B. the debt of A., which C. thereupon promises to do, then (though in general a chose in action cannot be assigned) B. may sue C. for the debt of A., as money had and received: *Israel v. Douglas*, 1 H. Bl. 239, *Fairlie v. Denton*, 8 B. & C. 395.(a) In such cases the liability transferred must be for an ascertained sum, and (as appears from *Cuxon v. Chadley*, 3 B. & C. 591, (10 E. C. L. R.)) (b) the debt due from the assigning party must be discharged by the transaction. Here neither of those circumstances existed. Ormerod Heyworth & Co. were not indebted to Hunt & Jenkinson, and these last were not, by making the order in question, released from the demands of Royds & Co.: there was no assignment of any supposed debt, to be taken in payment by them: they still retained their right to sue Hunt & Jenkinson. *Scott v. Porcher*, 3 Mer. 652, shows that in such a case there must, to complete the appropriation, be an assent of all the three parties; and, if a third party for whose benefit the direction is given, be not cognisant of it, the order is revocable. In the present case, to make the order irrevocable, Ormerod Heyworth & Co. should at least have promised Royds & Co. to pay them, in consideration of the order; then it might have been said that, as they had made themselves liable to Royds & Co. at the instance of Hunt & Jenkinson, these last could not alter the position of things by a revocation. But the defendants made their payment on the faith, not of the order, but of Royds & Co.'s guarantee. The order, therefore, was revocable, and revoked by the bankruptcy. If the goods were not sold before that event, they were the property of the assignees: if they had been previously sold, the assignees were entitled to the proceeds.

It cannot be contended that there was an equitable assignment of proceeds to Royds and Co., as in *Hunt v. Mortimer*, 10 B. & C. 44, (21 E. C. L. R.); for there the borrowing and the appropriation of the particular fund for payment were parcels of one and the same contract. So, in *Row v. Dawson*, 1 Ves. Sen. 331, the bankrupt had borrowed money, and made a draft in favour of the lenders, upon a fund in the exchequer to which he had a claim; and this was held good against the assignees, as an equitable assignment. There the money was partly due at the time of making the order. In the present case, Ormerod Heyworth & Co. had no fund when the letter of September 28th was written. They were to receive the proceeds of certain goods; but of what goods, and by what ship to arrive, was unknown. They could not say that any whole cargo, or part of a particular cargo, was appropriated to the payment in question: they were only to pay, out of the surplus, generally, of some proceeds, a sum not exceeding 5000*l*. The case, in this respect, resembles *Carvalho v. Burn*, 4 B. & Ad. 382, (24 E. C. L. R.)(c)

(a) See *Wilson v. Coupland*, 5 B. & Ald. 229, (7 E. C. L. R.)

(b) See *Wharton v. Walker*, 4 B. & C. 163, (10 E. C. L. R.)

(c) S. C. (*Burn v. Carvalho*) in Error, 1 A. & E. 888, (28 E. C. L. R.)

Crompton, contra. First, the letter of September 28th was not an order within the schedule of stat. 55 G. 3, c. 184. The object of that schedule was, that orders for the payment of money out of a particular fund that might or might not be available, or upon a contingency, which orders before the statute were not considered as bills of exchange, should be placed upon that footing for the purposes of the act: but it appears from the several clauses that that provision was not meant to take effect where the instrument was not either made payable to the bearer or to order, or delivered to the payee or some person on his behalf. The order was to be something which should give a credit to the party bearing it. It is contended that the persons acting in this case as acceptors are the agents of the payee for the purpose of having the instrument put into their hands. But the letter here is not sent to the payees, or by them to the defendants; the writers send it to the defendants, who are to keep it as their own security. The payees could not have demanded it of the defendants, even after they had agreed to make the required payment. And, if it had been meant that a delivery to the acceptor should bring the order described within the clauses of the schedule, it can scarcely be supposed that the acceptor would not have been mentioned. [LITTLEDALE, J. Suppose a person in London wrote a letter to his banker, desiring him to send 100*l.* to some one in the country: would that be an order "delivered" according to the schedule?] It clearly would not. Nor, if he sent a letter of credit to his banker, would that be an order held by the banker on behalf of the payee. The conditional assent of the defendants to pay over the money, which was the only document received by Royds & Co., does not fall within any of the requisitions of the schedule as to inland bills; but it may be inferred from the clauses respecting promissory notes, that such an assent in writing, and the letters connected with it, would be subject to stamp duty as parts of an agreement. Those clauses exempt from duty all notes promising payment out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not happen, "where the same shall not be made payable to the bearer or order, and also where the same shall be made payable to the bearer or to order, if the same shall amount to 20*l.*, or be indefinite." And then it is added that "such of the notes and instruments here exempted from the duty on promissory notes shall nevertheless be liable to the duty which may attach thereon, as agreements or otherwise. As to the cases. In *Emly v. Collins*, 6 M. & S. 144, the paper mentioned a specific sum, and was delivered by the drawer to an agent of the plaintiff, and by him to the defendant, who promised to pay. It was substantially a bill within the statute. In *Firbank v. Bell*, 1 B. & Ald. 36, the order was to pay 1500*l.* in bills (a case included in the enumeration of inland bills in the schedule); and the correspondence showed that the instrument had reached the hands of the payees. In *Butts v. Swann*, 2 Brod. & B. 78, (6 E. C. L. R.,) the sum was specified, and the instrument made payable to order. *Jones v. Simpson*, 2 B. & C. 318, (9 E. C. L. R.,) where the instrument was held not liable to duty as a bill, comes nearer to the present case. That turned upon a statute (48 G. 3, c. 149,) which required that the instruments therein subjected to duty as bills should be drawn for a specified sum: the order was for no specific sum, but contained merely a direction to pay over the proceeds of a shipment; and it was, for that reason, held not to be

a bill or order within the statute. [COLERIDGE, J. You may say here that the amount to be paid over might not have been 40s.; then no duty would have been payable.] The uncertainty being such, how, as ABBOTT, C. J., said in *Jones v. Simpson*, could the duty be calculated? In *Crowfoot v. Gurney*, 9 Bing. 372, (23 E. C. L. R.,) where the order was to pay J. S. & Sons "the balance due to me for building the Baptist College Chapel," the objection that a bill stamp was necessary does not seem to have been thought worth consideration by the Court.

Secondly, the three letters of 28th and 30th September constituted an agreement between Hunt & Jenkinson, Ormerod Heyworth & Co., and Royds & Co., that the proceeds in question, when accruing, should be received to the use of Royds & Co.; and they might have brought an action at law against Ormerod Heyworth & Co., if they had not paid over the 5000*l.* when received. On the statement of this case the foreign houses must be considered as identical with that of Ormerod Heyworth & Co. In the letters addressed to these last by Hunt & Jenkinson the houses are spoken of as "your foreign establishments." Ormerod Heyworth & Co. were entitled to have the proceeds of the sales returned through their hands: they were the agents; and Hunt & Jenkinson could not have got at the proceeds but through them. Then, under the arrangement contained in the three letters, Ormerod Heyworth & Co. were authorized by Hunt & Jenkinson to retain a certain part of the returns coming through their hands, for the use, and with the assent, of Royds & Co. Whether this constituted an equitable assignment or not, it was a binding agreement, and one in consideration of which Royds & Co. gave a guarantee against certain claims. The proceeds, therefore, when received by the defendants, were received to the use of Royds & Co. The bankrupt could not without fraud have attempted to revoke the disposition of these funds; neither, therefore, could the assignees do so. The case does not show whether the goods were sold before or after the act of bankruptcy; it only appears that, after the proceeds had been received, the assignees gave the defendants notice not to pay. But, if the defendants were allowed to receive the proceeds at all, they received them under the agreement, and to the use of Royds & Co. The assent of Ormerod Heyworth & Co. to the arrangement proposed on September 28th distinguishes this case from *Williams v. Everett*, 14 East, 582, and *Yates v. Bell*, 3 B. & Ald. 643, (a) (5 E. C. L. R.,) and makes the judgments in those cases authorities here for the defendants.

But further, independently of any legal right, the transaction of September 28th and 30th was an equitable assignment of the fund; and the assignees cannot claim what the bankrupt is not equitably entitled to. To make an equitable assignment valid, assent by the then holder of the fund is not necessary; *Tibbits v. George*, 5 A. & E. 107, (31 E. C. L. R.,) *Burn v. Carvalho*, 7 Sim. 109: even notice to him is not requisite for that purpose, but only to prevent the title of the assignees from attaching on the ground of apparent ownership; per PARKE, J., in *Hunt v. Mortimer*, 10 B. & C. 47, (21 E. C. L. R.,) and *Vacher v. Cocks*, 1 B. & Ad. 153, (20 E. C. L. R.,) And, at any rate, the foreign houses here were identical with that of Ormerod Heyworth & Co. for the purposes of assent and notice. The case, taken in that point of

(a) See *Baron v. Husband*, 4 B. & Ad. 611, (6 E. C. L. R.,); *Howell v. Batt*, 5 B. & Ad. 504, (27 E. C. L. R.,); *Lilly v. Hays*, 6 A. & E. 548, (31 E. C. L. R.,)

view, resembles *Hodgson v. Anderson*, 3 B. & C. 842, (10 E. C. L. R.) It is said, on the other side, that to render an appropriation of proceeds, like that now relied upon, irrevocable, the appropriation must have been part of the contract under which the debt was created; and to that point *Fisher v. Miller*, 1 Bing. 150, (8 E. C. L. R.,) is cited. But it must be inferred from the judgments in that case that Chesmer (whose assignees the plaintiffs were) would not have been entitled to recall the security he had given, although the appropriation had been subsequent to the incurring of the debt. He had made the proceeds of a cargo answerable for his debt, and it was held that he could not revoke such appropriation to the prejudice of the lenders. *Row v. Dawson*, 1 Ves. sen. 331, *Burn v. Carvalho*, and *Tibbits v. George*, do not bear out the argument, that the appropriation must have been part of the contract under which the debt arose. *Crowfoot v. Gurney*, 9 Bing. 372, (23 E. C. L. R.,) is opposed to it. ALDERSON, J., there refers to *Hodgson v. Anderson*, as deciding "that, although a creditor had a right to insist on payment to himself or to his appointee, yet, having once given an order for the payment of his debt to a third person, he had no right to revoke that order, provided there was a pledge by the person, to whom the authority was given, that he would pay the debt according to the authority." In *Bailey v. Culverwell*, 8 B. & C. 448, (15 E. C. L. R.,) an order by a debtor, desiring brokers to sell goods of his in their hands, and apply the proceeds in paying the creditor, for whom also the brokers acted, was held a valid appropriation as against the debtor's assignees, he becoming bankrupt after the order, though it was urged that no credit had been obtained on such order, which had not been communicated to the creditor till after the bankruptcy. *Row v. Dawson*, 1 Ves. sen. 331, shows that an equitable lien may be created upon part of a fund by an order like the present. In *Yates v. Groves*, 1 Ves. jun. 280, the order of a vendor, directing purchasers to pay a part of the purchase-money to his creditor on account of an antecedent debt, was held to give a similar lien. *Burn v. Carvalho*, 7 Sim. 109, is a case of the same class; and there it was decided that the equitable title passed, though there was no assent by the holder of the fund. Assent, in such a case, would give the legal right: but the equitable right passes without it: and, if that has passed, and the produce of the fund has been received, it cannot be recovered back in an action for money had. Accordingly, PATTESON, J., asks, in *Tibbits v. George*, 5 A. & E. 112, (31 E. C. L. R.,) "Is there any authority for saying that a trustee can sue the cestui que trust for money had and received?" It is suggested here that the assignees were entitled to the goods, and therefore may bring this action for the proceeds. But, if the goods were existing in specie at the time of the bankruptcy, it is doubtful whether trover would lie; and it does not appear that they were not sold before. At all events, the assignees should have countermanded the passing of the proceeds into the defendants' hands. It is no argument against the defendants, that they cannot point out any particular parcel of the cargoes upon which their right attaches: in an action of trover right must be shown to the specific chattel; but there is no corresponding limitation where the action is for money had and received. *Tibbits v. George*, 5 A. & E. 107, shows that the proceeds of a fund may be appropriated where no legal title is given to the fund itself. And in *Carvalho v. Burn*, 4

B. & Ad. 382,(a) if the goods had been turned into money, and the amount paid over, the circumstances in other respects being the same as in that case, it is not clear that an action for money had and received would have been maintainable. In *Best v. Argles*, 2 Cro. & M. 394, S. C. 4 Tyr. 256, an action for money had and received was held to lie against a party claiming an equitable interest; but there, as is remarked in *Tibbits v. George*, 5 A. & E. 116, (31 E. C. L. R.,) the equity was not clear. This last case also furnishes an answer to the objection that no notice was given to the parties holding the funds at the time of the agreement. The knowledge by the solicitor under the debtor's commission, which was there held sufficient notice, on the authority of *Smith v. Smith*, 2 Cro. & M. 231, S. C. 4 Tyr. 52, was a much less complete information than the knowledge possessed here by Ormerod Heyworth & Co., who at least were partners in the houses from which the proceeds in question were to be remitted. Even if their house and the foreign ones are not to be considered identical, the knowledge of any partner in one of those houses was the knowledge of the firm.

Cresswell, in reply. First, as to the stamp. It is no objection that the agreement does not show the minimum that might be paid over; for, by the schedule, a stamp duty is imposed on bills "for the payment of any sum of money out of any particular fund which may or may not be available." The act, therefore, contemplates stamping even where the bill may be wholly unproductive. As to the document not having been delivered; the schedule, in the clause just cited, speaks of bills, drafts, or orders, "payable to the bearer, or to order, or if the same shall be delivered to the payee," or some person on his behalf; the intention being, that a duty, as upon bills, should be imposed, where the instrument gave the payee a control over the fund. The whole question here, as to the stamp, is, whether Hunt & Jenkinson's letter of September 28th did give Royds & Co. such a control. The words *or order*, which occurred in a similar letter in *Butts v. Swann*, 2 B. & B. 78, (6 E. C. L. R.,) are not found here; but they are material only as showing the right of control given to the third party over the sum to be paid; and that sufficiently appears in this case from the other terms of the letter. [PATERSON, J. In an earlier part of the schedule the duty is imposed on bills payable to the bearer or to order, or delivered to the payee, without reference to any fund.] There the payee has to rely on the personal credit of the party to whom the order is addressed; but, whether the party benefited acquires a claim upon a person or a fund, the instrument operating to give such claim is a bill. Here, if the letter made an effectual disposition of the fund, it was a bill; if it did not, the fund belongs to the assignees.

It is contended that the three letters of September 28th and 30th constitute an agreement. But the reasoning of Lord ELLENBOROUGH in *Firbank v. Bell*, 1 B. & Ald. 36, applies. "There is nothing to which the name of an agreement can be given if you do not pray in aid the order; that is the only thing by which the bankrupt is personally implicated; for he is not a party to the other letters. The order alone affects the bankrupt, and that amounts to nothing more than an order for payment." No new consideration arose, as between Royds & Co. and Hunt & Jenkinson, from the last two letters. Royds & Co. could not, in an action against Ormerod Heyworth & Co., have declared

(a) S. C. in Error (*Burn v. Carvalho*), 1 A. & E. 883, (28 E. C. L. R.)

that they, in consideration of the order, promised to pay Royds & Co.; the only consideration between these latter parties was the guarantee. To make a binding and irrevocable agreement, according to *Scott v. Porcher*, 3 Mer. 652, all the persons should be parties to one and the same agreement. In *Wharton v. Walker*, 4 B. & C. 163, (10 E. C. L. R.), one Lythgoe, being indebted to the plaintiff, gave him an order on the defendant, Lythgoe's tenant, to pay the plaintiff out of the next rent. Plaintiff sent the order to defendant, but had no direct communication with him; and, in the next settlement of rent with Lythgoe, defendant took credit for the sum mentioned in the order, which he then produced, undertaking to pay plaintiff the amount. This Court held that the plaintiff could not recover it as money had and received by the defendant to his use; and one ground stated by BAYLEY, J., was: "If by an agreement between the three parties, the plaintiff had undertaken to look to the defendant and not to his original debtor, that would have been binding, and the plaintiff might have maintained an action on the agreement, but in order to give him that right of action, there must be an extinguishment of the intermediate debt. No such bargain was made between the parties in this case. Upon the defendant's refusing to pay the plaintiff, the latter might still sue Lythgoe, and this brings the case within *Cuxon v. Chadley*, 3 B. & C. 591, (10 E. C. L. R.)." And in these reasons HOLROYD, J., and LITLEDALE, J., agreed. Here, if the arrangement had been such that the debt of Hunt & Jenkinson to Royds & Co. had been discharged, the transaction might perhaps have been an agreement among all the parties, on good consideration. [PATTESON, J. In *Wharton v. Walker*, if the defendant had paid the plaintiff it would have been a good payment as against Lythgoe, unless he could have revoked his assent. In no case of an equitable assignment does the debtor come under a legal obligation to pay the assignee; but, if he does pay, such payment is good.] In *Hodgson v. Anderson*, 3 B. & C. 842, cited on the other side, there was an assignment of an existing debt, and a consideration for it, time being given to the assignor; and the debtor's agents promised to pay: there the order to pay over could not be revoked. Here, at the time of giving the order, there was no debt in existence which could be assigned by it. It is contended that the houses of Ormerod Heyworth & Co., and the foreign houses, must be considered as identical: but the case does not show that. There was no privity of contract between Royds & Co. and the foreign houses. Royds & Co. were to be paid out of the proceeds of the goods when sold; the goods themselves were not bound by that agreement, in the hands of the foreign firms. Had the goods remained in specie, they would have passed to the assignees subject to any lien of the firm which held them. It lay, therefore, on the defendants to show that at the time of the agreement the goods had been sold and the proceeds received, so that the fund to be assigned had, at that period, an existence. It is said that, because Ormerod Heyworth & Co. were allowed to receive the proceeds, the appropriation of them was not revoked; but a revocation does take place if, when parties have been ordered to receive a sum for one purpose, that order is countermanded, and they are told to receive it for another. [PATTESON, J. It does not appear that these funds could have been prevented from coming to the defendants' hands. Their course of dealing was to account for the proceeds of the sales, "after repaying themselves thereout their commission, advances, and other

charges." The assignees could not interfere with that. COLERIDGE, J. When the proceeds of sales were received by the foreign houses, was not there a subsisting debt?] Not from the defendants: they were not responsible for those houses. They did not act under a *del credere* commission. The principle of *Crowfoot v. Gurney*, 9 Bing. 372, (23 E. C. L. R.,) and other cases of the same class, is explained by the Court in *Best v. Argles*, 2 Cro. & M. 394, S. C. 4 Tyr. 256. To make a good equitable assignment there ought to be a sale and purchase of the fund for a contemporaneous consideration, as in *Hunt v. Mortimer*, 10 B. & C. 44, (21 E. C. L. R.,) and *Tibbits v. George*, 5 A. & E. 107, (31 E. C. L. R.,) Here no such fact is shown. It does not appear that Royds & Co. bound themselves, under the supposed agreement, to give any new credit to Hunt & Jenkinson. [COLERIDGE, J. How was the bankrupt Streather more discharged in *Crowfoot v. Gurney* than Hunt & Jenkinson here?] TINDAL, C. J., thought, in that case, that there was consideration enough for the assignment, as Solly, to whom it was made, appeared, from the time of the order, to have made no application to Streather, and looked to the defendant only. And there the assent by the defendant was, simply, to pay the balance mentioned in the order, in consideration of being discharged from his debt to the bankrupt: here Ormerod Heyworth & Co. undertook to pay in consideration of a guarantee.

Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the Court.

There are two questions in this case. First, whether the letter of Hunt & Jenkinson to the defendants, of the date of September 28th, 1831, required the stamp imposed by 55 G. 3, c. 184, as an order for the payment of money: if it did, then it was not admissible in evidence; and, as that letter was the authority for paying the 5000*l.* to Royds & Co., there must be judgment for the plaintiffs. Secondly, supposing that letter did not require a stamp as an order for the payment of money, whether the authority contained in it was revoked by the bankruptcy of Hunt, and the notice from the assignees: if it was so revoked, in that case also there must be judgment for the plaintiffs.

As to the first question, the clause in the schedule of 55 G. 3, c. 184, applicable to this is, "all bills, drafts, or orders, for the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen, if the same shall be made payable to the bearer, or to order, or if the same shall be delivered to the payee or some person on his or her behalf." Then, in determining whether it be an order for the payment of money within the meaning of the schedule, the first thing to be considered is, whether, as it is not an order to pay a distinct sum of money, but only the proceeds of funds provided they do not exceed 5000*l.*, it falls within the act. In *Jones v. Simpson*, 2 B. & C. 318, (9 E. C. L. R.,) the order was to sell certain goods which were stated to be of about the value of 2000*l.*, and to pay the proceeds. The Court was quite clear that it did not fall within the description in the schedule as to the liability to stamp duty, because there was no sum mentioned on which the duty could attach; and, if the question in this case had arisen upon the letter of 23d September, in which there is no precise sum mentioned, that letter, according to the case of *Jones v. Simpson*, just mentioned, would not have required any stamp. But in the letter of 28th September, 1831, there is a sum of 5000*l.* which may be paid;

and though it might not necessarily be so much, yet as, in the schedule as to inland bills, a duty is imposed "where the total amount of the money thereby made payable shall be specified therein, or can be ascertained therefrom," we think that the case arising out of the letter of 28th of September differs from *Jones v. Simpson*, and that, if on other accounts it be an order for the payment of money within the meaning of the schedule, a stamp duty in respect of 5000*l.* would attach upon it.

But the schedule as to orders for payment of money requires that, in order to make a stamp necessary, they should be made payable to the bearer or to order, or be delivered to the payee or some person on his behalf. In the cases of *Emly v. Collins*, 6 M. & S. 144, *Firbank v. Bell*, 1 B. & Ald. 36, and *Butts v. Swann*, 2 Brod. & B. 78, no question was made as to these qualifications, nor was it necessary: for in *Emly v. Collins* the order was delivered to an agent of the payee; in *Firbank v. Bell* the order appears to have been delivered to the payee, inasmuch as the payee is stated to have sent a copy to the person to whom the order was addressed; and in *Butts v. Swann* the order was made payable to order. But the present letter does not make the money payable to the bearer or to order, and is not delivered to the payee.

Then is this document delivered to any person on behalf of the payee within the meaning of the schedule? Now the letter containing the authority to pay is delivered to the defendants; and then is that a delivery to them on behalf of the payees Messrs. Royds & Co.? So far it is a delivery to the defendants for the benefit of the payees, and the defendants may be trustees for them; but it was not meant that the defendants should hand over the document to the payees; they were to act upon it as they might think right, and according to what it was expected they should do; but, when they did act upon it by any promise or undertaking, that did not constitute a delivery of the document itself to the payees, but the defendants were to keep the document themselves, not as agents to the payees, but for their own security, to prove, when they should pay the money, that it was by authority of the persons who gave the order that they had done so. The giving the undertaking by the defendants to Messrs. Royds & Co. could not be coupled with the letter of Hunt & Jenkinson to the defendants, so as to make a stamp necessary, because the question of a stamp must be decided by the instrument when it is first issued, and not by what may happen afterwards: and we think that the delivery to the payee, or some person on his behalf, means a delivery, either personally to the payee or to some agent or representative of his, and does not mean the person to whom the order is addressed; and consequently this document, which is addressed and sent to the defendants, is not such an instrument as under the part of the schedule in question requires a stamp.

Then, having come to the conclusion that this document did not require the stamp contended for, the remaining question is, whether the authority to pay to the extent of 5000*l.* was countermanded by the bankruptcy of Hunt & Jenkinson, and the notice from the assignees.

If the case had stood merely upon the authority in the letter of the 28th September, without more, and the defendants, or Hunt & Jenkinson, or Messrs. Royds & Co., had not done anything more, and the money had been paid upon it, we think the authority to pay would have been revoked by the bankruptcy and the notice from the assignees: but

that is not the state of things as they exist; and the whole of the circumstances must be considered.

The first document is the letter of 23d September, 1831, by Hunt & Jenkinson to the defendants, authorizing them to pay money to Messrs. Royds. Upon the receipt of this, the defendants write to Hunt & Jenkinson a letter which they either had sent or proposed to send to Messrs. Royds; but Hunt & Jenkinson think it is not satisfactory, and they return it to the defendants, and revoke the authority contained in the letter of the 23d September, and send the letter in question of the 28th September, which they wish to be acted upon: and the defendants, upon receipt of that, write to Messrs. Royds, giving an undertaking to comply with the letter of Hunt & Jenkinson on being guaranteed by Messrs. Royds; and then, in answer, Messrs. Royds & Co. give the defendants the guarantee which they asked for. It appears, therefore, that all the three parties, that is, Hunt & Jenkinson as one of the parties, the defendants as another, and Royds & Co. a third, concurred in the arrangement; and that Hunt & Jenkinson were aware that the defendants meant to require the guarantee of Messrs. Royds, inasmuch as the defendants' letter to Messrs. Royds of the 23d September, requiring the guarantee, was contained in the letter of that date from the defendants to Hunt & Jenkinson. It appears, therefore, on the whole, that Hunt & Jenkinson being indebted to their bankers, Messrs. Royds & Co., and, in the common course of things, expecting further advances, or else a forbearance of pressure for the payment of what was due, authorize the defendants to pay money out of certain funds to the extent of 5000*l.* to Messrs. Royds, in liquidation of the whole or part of their debt. The defendants give to Messrs. Royds an undertaking to do so, but conditionally that a guarantee of indemnity shall be given by them; and which guarantee Messrs. Royds do give, and accept the undertaking of defendants. The whole of this, taken together, appears to us to constitute an appropriation of funds to the extent of 5000*l.* to Messrs. Royds, or else to an equitable assignment of these funds; but, whether it be an appropriation or an equitable assignment, it is not in either case in our opinion revoked by the bankruptcy of Hunt.

But it is contended by the plaintiffs that an arrangement of this sort ought to form part of the original transaction. But there does not appear any original transaction to which this can be referred: the dealing between Hunt & Jenkinson and the defendants began twelve years before 1831: when it began between Messrs. Royds and Hunt & Jenkinson, does not appear: but the dealings of Hunt & Jenkinson with these respective houses had been quite distinct, and had nothing to do with each other. The transaction in question was the first in which all the parties were originally concerned. It is said there is no consideration for this arrangement: but we think there is; for Hunt & Jenkinson were indebted to Messrs. Royds in upwards of 5000*l.*; and the latter, on receiving this contingent security for 5000*l.*, of the probability of realizing which they would no doubt inquire, would be more inclined to give additional credit to Hunt & Jenkinson, and the latter would be less likely to be proceeded against for the recovery of the money by Messrs. Royds & Co.

Then it is said that the defendants did not pay this money on the authority of Hunt & Jenkinson, but on the guarantee of Messrs. Royds. But, though they would not have paid it without the guarantee of

Messrs. Royds, they paid it principally on the authority of Messrs. Hunt & Jenkinson, and in fact they paid it on both together. It is said also that, as to some of the cases, there was a specific ascertained debt to which the appropriation or assignment of the funds was to be applied. But we think it is not necessary that the debt to which the appropriation was to be made should be ascertained. The funds to be appropriated were not to exceed 5000*l.*; and, if the debt due to Royds was less, the money to be paid to them would be less: but it can make no difference whether the debt due to Royds was a specific sum of 1000*l.* or any indefinite sum, but so that whatever their debt was they should get no more than 5000*l.*

A great many cases have been cited on the argument in this, and we may refer to *Row v. Dawson*, 1 Ves. sen. 331, *Yeates v. Groves*, 1 Ves. jun. 280, *Fisher v. Miller*, 1 Bing. 150, (8 E. C. L. R.,) *Hodgson v. Anderson*, 3 B. & C. 842, (10 E. C. L. R.,) *Wharton v. Walker*, 4 B. & C. 163, (10 E. C. L. R.,) *Fairlie v. Denton*, 8 B. & C. 395, (15 E. C. L. R.,) *Bailey v. Culverwell*, 8 B. & C. 448, *Hunt v. Mortimer*, 10 B. & C. 44, (21 E. C. L. R.,) *Crowfoot v. Gurney*, 9 Bing. 372, (21 E. C. L. R.,) *Tibbits v. George*, 5 A. & E. 107, (31 E. C. L. R.,) *Smith v. Smith*, 2 Cro. & M. 231, S. C. 4 Tyr. 52, *Williams v. Everett*, 14 East, 582, *Carvalho v. Burn*, 4 B. & Ad. 382, (a) (24 E. C. L. R.,) *Scott v. Porcher*, 3 Mer. 652. Not, indeed, that any of these cases are precisely the same as the present; but the principles on which they were decided, we think, apply to the view we have taken of this case. In *Carvalho v. Burn*, first in this Court and afterwards in the Exchequer Chamber, the assignees of the bankrupt were held entitled to recover under circumstances bearing some resemblance to the present. But that was an action of trover for goods; and the two courts of law held that the assignees had the legal property in the goods, leaving the equitable rights of the parties to be considered in a court of equity: and in the same case in Simons, (7 Sim. 109,) the Vice-Chancellor, on demurrer to a bill in equity, seems to have considered that the defendant at law, who stood in the same situation as the defendants here, was entitled to the benefit of the arrangement against the assignees of the bankrupt: and that decision of the Vice-Chancellor's was afterwards confirmed by the Lords Commissioners. (b)

In the case of *Scott v. Porcher*, 3 Mer. 652, Sir WILLIAM GRANT, Master of the Rolls, says, "The case is stripped of almost every circumstance that has ever been relied upon as constituting an irrevocable appropriation;" and, amongst other things, there had been no communication made to Porcher (who stood in the same relative situation as Royds) of the directions that had been given. But here everything has been done that could be; and it seems, from the whole of the remarks made by the Master of the Rolls, that under circumstances like the present he would have been of opinion with the defendants.

Upon the whole of this case, then, we are of opinion that a nonsuit should be entered.

Nonsuit to be entered.

(a) S. C. (*Burn v. Carvalho*) in Error, 1 A. & E. 883, (28 E. C. L. R.) S. C. (*Burn v. Carvalho*) in Chancery, 7 Sim. 109.

(b) So stated in 7 Sim. 120, note. The reporters are informed that the case came before Lord Cottenham, C., on appeal in 1839, and that his Lordship affirmed the decree of the Vice-Chancellor.

IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

TYSON against SMITH.—p. 406

In trespass for breaking and entering plaintiff's close and erecting stalls, booths, &c., there, defendant justified under a custom that, at fairs holden at certain times of the year, on some part of the commons and waste of a manor, to be named by the lord of the manor (the locus in quo being parcel of such commons and waste, and named by the lord,) every liege subject exercising the trade of a victualler might enter at the time of the fairs, and, for the more conveniently carrying on his said trade, erect a booth, &c., and continue the same for a reasonable time after the fairs, paying 2*d.* to the lord.

Held, that the custom was reasonable, and the plea a good justification in trespass brought by the owner of the soil.

And that the word "victualler" was to be understood in the sense which it bore at the time of the plea pleaded.

TRESPASS(a) for (among other trespasses) breaking and entering plaintiff's close, treading down the grass, and placing and erecting stalls, posts, booths, and tables on the said close, and continuing them without the leave, &c.

Third plea, as to the trespasses above specified, that, from time whereof, &c., on certain days (viz. on Monday next after the feast day of Pentecost, and afterwards on each alternate Monday in each and every year, until the feast of All Souls,) fairs, for the buying and selling of all kinds of goods, wares and merchandises, have been, and of right ought to have been, and still of right ought to be, holden on the commons and waste grounds of the manor, lordship, or forest of Westward, in the county of Cumberland, that is to say, on some part thereof appointed for that purpose, from time to time, by the lord of the said manor, &c., for the time being. And that from time whereof, &c., there hath been, and of right, &c., and still of right, &c., an ancient and laudable custom within the said manor, &c., viz. that every liege subject of this realm exercising the trade or calling of a victualler, at a reasonable time before the Monday next after the feast day of Pentecost, in each and every year, hath, during all the time aforesaid, been used and accustomed to enter, and of right, &c., and still of right, &c., into and upon that part of the said commons or waste grounds, from time to time appointed for holding the said fairs by the lord of the said manor, &c., and, for the more conveniently carrying on his said trade or calling, to erect a booth and stall, and to put and place posts and tables there, and to keep and continue the said booth, stall, posts, and tables so erected, &c., from thenceforth until a reasonable time after the last of the said fairs, yielding and paying therefore to the lord the sum of 2*d.*, when lawfully demanded. Averment, that the close in which, &c., at the times when, &c., was parcel of the said commons or waste grounds, and, before the first of the said several times when, &c., had been appointed by the Earl of Egremont, the lord for the time being, as the place for holding the said fairs, &c.: and the plaintiff, at the said times when, &c., held and occupied the close in which, &c., as tenant thereof to the said earl, &c. Wherefore defendant, being a liege subject, &c., and exercising the trade or calling of a victualler, for the purpose of erecting a booth, &c. (justification under the custom.)

(a) The declaration and third plea are set out at rather more length in *Tyson v. Smith*, 6 A. & E. 745, (38 E. C. L. R.)

Fifth plea, as to the same trespasses, that, from time whereof, &c., until the making of the award after mentioned, fairs, for the buying and selling of all kinds of goods, &c., have been, and of right ought to have been, holden on the commons or waste grounds of the said manor, lordship, or forest, viz. on some part thereof appointed for that purpose from time to time by the lord of the said manor, &c., on &c. (stating the days as in the third plea :) that, from time whereof, &c. until the making of the said award, there had been, and of right ought, &c., an ancient and laudable custom, used and approved of within the said manor, &c., (setting out a custom corresponding with that in the third plea.) That afterwards, and before any of the said times when, &c., to wit 6th May, 51 G. 3, (1811) (liii. local and personal public,) an act passed for enclosing lands in the said manor, lordship, or forest, by which commissioners were appointed for setting out, dividing, allotting, and closing the commons and waste grounds in the said act mentioned, according to the rules, &c. contained therein and in the General Inclosure Act, stat. 41 G. 3, U. K. c. 109, and it was enacted that the commissioners should set out and appoint unto the Earl of Egremont, his heirs and assigns, lord or lords of the said manor, &c., for the time being, in some proper and convenient place within the said manor, &c., a sufficient quantity of land (not exceeding forty acres) off and from the said commons and waste grounds, for the purpose of keeping and holding fairs thereon annually, according to ancient custom ; and, subject thereto, the herbage of the said land so set out should belong to, and be enjoyed by, such person or persons, and in such manner, &c., as the commissioners should appoint. averment that the commissioners, by their award, in pursuance of the act, set out and appointed to the said Earl of E., his heirs and assigns, lord or lords of the said manor, &c., for the time being, in a proper and convenient place within the said manor, &c., situate, &c., forty acres, off and from the said commons and waste grounds, for the purpose of keeping and holding fairs thereon annually, according to ancient custom, of which forty acres the close in which, &c., at the times when, &c., was, and is, parcel : averment that, from the time of the making the said award hitherto, every liege subject of this realm exercising the trade or calling of a victualler, at a reasonable time before the Monday, &c., hath been used, &c. (as in the third plea only stating the entry to be on the close in which, &c., being parcel of the forty acres awarded for the purpose of holding fairs,) and, for the more convenient carrying on his said trade or calling, to erect a booth, &c. (as in the third plea :) wherefore the said defendant, being a liege subject, &c. (Justification under the right claimed in this plea.)

The replication traversed the existence of the customs set forth in the third and fifth pleas. Upon these traverses, issue was joined ; and several other issues in fact were also joined. On the trial before Lord ABINGER, C. B., at the Cumberland summer assizes, 1835, a verdict was found for the defendant on the issues upon the traverses to the third and fifth pleas, and for the plaintiff on all the other issues. A rule was obtained in the Queen's Bench to enter judgment for the plaintiff, non obstante veredicto, which was discharged in Easter term, 1837.(a)

(a) See the argument and judgment, *Tyson v. Smith*, 6 A. & E. 745, (33 E. C. L. R.) In that report the issue on the third plea only is said to have been found for the defendant ; and this was the assumption on which the judgment proceeded. It will be seen, by the judgment in the present case, that the difference does not affect the principle of the decision.

Judgment having been entered in that court for the defendant, error was brought in the Exchequer Chamber.

The case was argued in this vacation, 3d December, 1838, before TINDAL, C. J., BOSANQUET, COLTMAN, and VAUGHAN, Js., PARKE, ALDERSON, and GURNEY, Bs.

W. H. Watson, for the plaintiff in error (the plaintiff below). The custom set out in the third and fifth pleas is bad. First, the description of persons by whom it is to be enjoyed is unlimited; for the words "every liege subject of this realm exercising the trade or calling of a victualler" would comprehend any one who chose to sell victuals. The word "victuallers" is now ordinarily applied to one who keeps a public-house: but that restriction of the meaning is modern, as appears from the uses of the word in *Com. Dig. Justices of Peace*, (B 87), (B 89). In 1 stat. 13 R. 2, c. 8, the word is used for all persons supplying meat or drink, and answers to the expression "sellers of all manner of victuals" in stat. 23 Ed. 3, c. 6. In stat. 7 R. 2, c. 11, vintners and victuallers are separately mentioned. The custom here is not even limited to those who have exercised the trade for any given time. [PARKE, B. No one could enter without being a victualler: it seems, therefore, that the custom is limited to those who have already exercised the trade.] That is still too large a class: any one might begin the trade the moment before entering. If the meaning be that any one may use the land for the purpose of the trade, then the plea is bad; for that right would be not by custom, but general law, supposing it to exist at all. In *Fitch v. Rawling*, 2 H. Bl. 393, (where a custom for all persons, for the time being, being in a parish, to exercise lawful games on the soil of an individual, was held bad), BULLER, J., said, "How that which may be claimed by all the inhabitants of England can be the subject of a custom, I cannot conceive. Customs must in their nature be confined to individuals of a particular description, and what is common to all mankind, can never be claimed as a custom." A plea of a custom among merchants throughout England, that one merchant may assign to another the King's license to lade wine in a strange ship, is bad; the right alleged being by common law, if at all, and not by custom; Bro. Abr. *Customes*, 59.(a) Here, it is true, the custom is to be exercised only in a particular place; but, as it is to be exercised, practically, by all the liege subjects, the objection applies. [BOSANQUET, J. Where the owner of a soil is entitled to toll traverse, any one may go.] That is from a qualified dedication to the public by the owner of the soil; it is not like a custom: and, if the right here be treated as analogous to an easement, the plea is bad. A right in the occupiers of a close to use a way cannot be laid as a custom, but must be prescribed for; *Baker v. Brereman*, Cro. Car. 418. It is true that in the old books there occasionally appears a confusion between prescription and custom; for sometimes the word custom is applied to a right to profit à prendre in the soil of another, which must be prescribed for. A way of necessity to go to a church, or to a market, is matter of prescription: so is a right for inhabitants of a vill to dance in the soil of an individual, such as was pleaded in *Abbot v. Weekly*, 1 Lev. 176. It has been supposed that a custom was claimed for the men of Kent, after fishing, to dig in the land adjoining the sea, and pitch stakes for hanging their nets to dry; Bro. Abr. *Customes*, 46. But, on reference to the Year

Book, Mich. 8 Ed. 4, 18 B. pl. 30, which is the authority cited in Brooke, it is clear that the decision there was not on a custom but on a common law right. [ALDERSON, B. It is treated as a custom in the judgment of HOLROYD, J., in *Blundell v. Catterall*, 5 B. & Ald. 268, (7 E. C. L. R.), (a) which is one of the ablest judgments ever pronounced in Westminster Hall.] It certainly is so treated, both by HOLROYD, J., and by HALE. (b) But CHOKE, C. J. of C. P., says that the custom cannot be good, because it is against common law to prescribe to dig in the soil of another, though, he says, there are other *customs used throughout all the land* which are legal. LITTLETON, J., says that a custom which runs through the whole land is common law; but that the alleged custom in question is against reason, because under it the whole meadow might be destroyed. DANBY, J., says that fishermen may justify going on the land adjoining the sea, because the fishery is for the common weal, and therefore, he says, this is common law. And CHOKE, C. J., afterwards adds that, as every one may fish in the sea of common right, so perhaps, at ebb tide, digging between the high and low water marks may be justified. It is clear that the whole discussion was upon the general right. (c) HOLROYD, J., goes no farther than to lay down that such a right, if supportable at all, must rest upon a particular custom; that was enough to show that the case did not bear out the plea in *Blundell v. Catterall*, which was on the common law. In Brooke's Abridgment many rights are called customs which are by common law; such as the right to turn a plough upon the headland, which is matter of general law, per BRIAN, C. J. of C. P. (d) "A custom which may be general, and extend to all the subjects in England, and is not warranted by, but contrary to the common law, is void;" 7 Vin. Abr. 189, *Customs*, (H), pl. 30. (e) Further, the custom, as here set out, is incompatible with the existence of the fair. From 2 Inst. 219, 220, it appears that fairs were considered to be of great importance for the purpose of affording the means of selling and purchasing. The owner himself could grant for stalls only so much soil as would leave room for the market; *Rex v. Burdett*, 1 Ld. Raym. 148. But, as this custom is pleaded, stalls might be erected to any extent. It was said, in the argument below, that the Court would intend that the use would be reasonable; but such an answer might be given in every case of unreasonable custom. A plea of approvement under the statute of Merton, 20 H. 3, c. 4, must show that pasture was left for the commoners. And a custom for the lord of the manor to grant leases of the waste of the manor without restriction is bad; *Badger v. Ford*, 3 B. & Ald. 153, (5 E. C. L. R.), *Arlett v. Ellis*, 7 B. & C. 346, (14 E. C. L. R.) So a prescription for common appurtenant sans nombre, not limited to cattle levant and couchant, is bad on general demurrer; notes 4 and *k* to *Earl of Manchester v. Vale*, 1 Wms. Saund. 28 a, *Potter v. North*, 1

(a) See p. 296, 297.

(b) De Port. Mar. 86.

(c) It seems that the general right came into question in consequence of an objection taken to the plea, that it laid the right in the men of Kent generally, so as to amount to an assertion of a general common law right; whence it was inferred that the plea would fail unless such general right existed.

(d) Bro. Abr. *Customs*, 51. Citing Yearb. Pasch. 21 Ed. 4, fol. 28 B. pl. 28. See Yearb. Pasch. 22 Ed. 4, fol. 8 B. pl. 24. 7 Vin. Abr. 174, *Custom*, (P), pl. 4, lb. 188, *Customs*, (F), pl. 1.

(e) Citing *Sherborn v. Bostock*, Fitzgib. 51.

Saund. 352. After verdict it might be intended that the cattle had been proved to be levant and couchant; but here the custom must be bad or good as set out on the record. In *The Mayor, &c., of Northampton v. Ward*, 1 Wils. 107, S. C. 2 Str. 1238, the objection urged against the present custom was applied successfully to the existence of a common law right to erect a stall in a market. Further, the time is claimed too largely. A reasonable time before and after the fair is beyond what can be warranted by custom. And, at any rate, such a custom cannot be good as against the owner of the soil. The right to go on the land of another is an easement. This is in the nature of a profit à prendre, which cannot be claimed by custom; *Grimstead v. Marlowe*, 4 T. R. 717.(a) The land is broken to fix the posts; the owner loses his land, and the consequence arises which was suggested by LITTLETON, J., in Yearb. Mich. 8 Ed. 4, 18 B. pl. 30, that all the use of the land might be taken from the owner: for this there must, at least, be a prescription. It may perhaps be contended here that the record does not show any digging in the soil: but it shows, at any rate, as complete an exclusion from the land as that would. In fact, however, the language of the declaration clearly implies a breaking of the soil. Rights to be exercised in the soil of another are confined to the inhabitants of the particular district within which the right is to be exercised. It is true that a copyholder may claim common within the manor by custom, not being able to prescribe for it by reason of the feebleness of his estate: but, out of the manor, he cannot claim by custom, and must prescribe in the name of his lord; note (11) to *Potter v. North*, 1 Wm. Saunds. 349. *Taylor v. Devey*, 7 A. & E. 409, (34 E. C. L. R.), is an instance in which a custom was held bad because too large a right was claimed in alieno solo. It was said, in *Fitch v. Rawling*, 2 H. Bl. 395, that there might be a right, by custom, to water cattle at a watering place: but *Pain v. Patrick*, 3 Mod. 294, which is referred to for this, does not warrant the doctrine. It is important to keep in view the distinction between a claim to set up stalls, on paying stallage, and a claim to enter the land for the purposes of the fair. Tolls are not necessarily incident to a fair, though by custom or charter they may be claimable by the lord: but stallage is a right in the owner of the soil, not in the character of lord of the fair, to take compensation for the use of his land; and such stalls cannot be erected, merely as incidental to the fair, without license from the owner of the soil. In *The Mayor, &c., of Northampton v. Ward*, 1 Wils. 107, S. C. 2 Str. 1238, LEE, C. J., said, "A market might not improperly be compared to a parish church, whither all the parishioners have a right to go to hear divine service, but have not liberty to furnish themselves with pews without the appointment of the ordinary; and the reason of the law being so, is for avoiding confusion and disorder in public meetings and assemblies; and that no case had been cited, nor could he find any in the books, to show that a man, coming to a market, had a right to erect a stall without license from the owner of the soil." Where a fair is granted to one and his heirs on land which is borough English, the stallage will go to the youngest son, but a fair to the common law heir; *Heddy v. Welhouse*, Moore, 474. This shows that a custom cannot be reasonable which would enable those using the

(a) See *Blewett v. Tregonning*, 8 A. & E. 554, (30 E. C. L. R.) *Gateway's Case*, 6 Rep. 59 b.

fair to exert a right against one who may be owner of the soil and not lord of the fair.

The judgment below shows no ground for the decision. It is there said that there was an absence of authority for the argument on behalf of the plaintiff: but it appears that numerous authorities were adduced which, in principle, showed the invalidity of the custom. It is said also, that the description of victuallers is sufficiently definite. [BOSANQUET, J. Must we not take it that the word is used in the sense which it bore at the time of pleading the plea?] If the word be confined to its modern statutable sense, the custom, which is laid as immemorial, cannot exist. It is also said that the owner may be excluded from his own soil by a reasonable custom: but no such custom would be reasonable.

Cresswell for the defendant in error (the defendant below). It appears by the fifth plea that the legislature has recognised the market, with the custom attached to it. The Court, after verdict, will hold the custom good, if it be capable of any explanation which will make it legal. It does not follow, from there being now no apparent reason for a custom, that there never was: this was said in *Hix v. Gardiner*, 2 Bulstr. 195, where Lord COKE cited the maxim *qui rationem in omnibus querit, rationem destruit*. In *Cocksedge v. Fanshaw*, 1 Doug. 132, Lord MANSFIELD adopted a similar principle. It is said that the custom here is unrestrained. But it is confined to a particular class, victuallers. The parties must be victuallers before they exercise the right. It is said that any one may become a victualler: but the same objection might be made to almost any limitation, as inhabitants of a town. It is also objected that the custom is bad as against the lord. But the lord has a recompense, the sufficiency of which cannot be discussed by the Court. Besides, the defendants do not claim a several right as against the lord. In the case in Bro. Abr. *Customes*, 46, and Yearb. Mich. 8 Ed. 4, 18 B. pl. 30, two rights came in question: first, the common law right to fish in the sea, and possibly, as incidental thereto, to land fish on the shore; secondly, the right to dry nets and fix stakes for the purpose. The latter was held a bad custom, so far as concerned the breaking the soil, as destroying the inheritance. Here the custom does not destroy the inheritance: for it does not appear that the soil will be broken. It is argued that even toll is not necessarily incident to a fair, but depends on custom or grant. [PARKE, B., referred to *Holloway v. Smith*, 2 Str. 1171, and *Bennington v. Taylor*, 2 Lutw. 1517.] Here the claim rests entirely on special custom. It is true that there is no common law right to erect a stall in the fair, but that the lord's license must be had; *The Mayor, &c., of Northampton v. Ward*, 1 Wils. 107, S. C. 2 Str. 1238. But the lord might have granted it at any time, with or without remuneration; and that would have been a good origin of a custom. [COLTMAN, J. It is difficult to see how there could be a grant to victuallers as a body. PARKE, B. Custom supposes a local law. TINDAL, C. J. If there were a grant, it would be a prescription.] LEE, C. J., said, in the last cited case, that, if the frequenter of the market "requires any particular easement or convenience, as a stall in the market, he must have the license of the owner of the soil for that purpose, if there be no particular sum fixed by the custom of the market for stallage; if there be a fixed sum or duty by custom, that cannot be exceeded, but still he must agree with the owner of the soil." Spelman, in Gloss., verb. *Stal-*

langiator, there cited, is to a similar effect. Now here the verdict finds a fixed sum under the special custom. *Rex v. Burdett*, 1 Ld. Raym. 148, shows only that it is extortion in the lord to let stalls to such an extent as to prevent the proper use of the fair, and then to demand money for them. It does not even appear that he might not have lent them gratuitously to any extent. Then, as to the length of time. If a custom may exclude the owner of the soil for one month, why not for two? If the time be very great, that may be a good reason for disbelieving the existence of such a custom in fact, but not for holding the custom bad. The compensation may be adequate. It does not appear that there was any compensation in the case of the custom which was held good in *Fitch v. Rawling*, 2 H. Bl. 393. There the recreation was to be at all seasonable times: it might have been as well said there, as here, that the time was too largely laid, and that the owner might be excluded from his soil. Then, as to the alleged obstruction of the public. There is no such general rule as that suggested, that the right must be laid in the inhabitants of the particular district. This objection is merely the one before discussed, as to the extent of the meaning of the word "victualler." It is attempted to put this right on the footing of a profit à prendre; but it is more in the nature of an easement; nothing is taken from the soil. In *Rex v. Starkey*, 7 A. & E. 95, (34 E. C. L. R.,) the claim of right to erect stalls in a market was not questioned, though no limitation was shown. The objection that the public may possibly be excluded by the erection of stalls, might as strongly be urged against placing crates of earthenware, or letting cattle stand. *Badger v. Ford*, 3 B. & Ald. 153, (5 E. C. L. R.,) is inapplicable. There the lord had done an act inconsistent with the enjoyment of the common, he having himself granted the copyhold to which the right of common was annexed. If this objection be good, the plaintiff should have replied excessive user.

W. H. Watson, in reply. The local act recognises such customs only as were valid at the time. No instance has been shown of a person out of a manor claiming by custom within it. A copyholder claims so by prescription only. *Blewitt v. Tregoning*, 3 A. & E. 554, (30 E. C. L. R.,) and especially the question of *LITTLEDALE, J.*, there,^(a) shows the importance of this distinction. [PARKE, B. *Clarkson v. Woodhouse*(b) is against you.] The argument on the other side would, if tenable, support the custom which was held bad in *Fitch v. Rawling*, 2 H. Bl. 393. Neither prescription nor custom, which excludes the owner of the soil, can be good; Co. Litt. 122 a. *Rex v. Starkey* is inapplicable. [PARKE, B. That case decided only that a market was not properly removed unless the public were as well provided for as before.] As to the time; it could not be said that even goods might be left from fair day to fair day.

Cur. adv. vult.

TINDAL, C. J. now delivered the judgment of the court.

In this case, the issues raised on the third and fifth pleas, which go to the whole action, have been found for the defendant below, and judgment has been given thereon accordingly in his favour; and this writ of error is brought to reverse such judgment, on the ground that the custom set forth in those pleas, and upon which the whole of the defendant's justification rests, is unreasonable, and therefore bad in law.

(a) Page 572.

(b) Note (a) to *Bateson v. Green*, 5 T. R. 412.

The third plea (and it will be unnecessary to give a separate consideration to the fifth, as the same objections apply equally to both) begins by stating the existence of a fair by prescription to be held on some part of the commons and waste grounds of the manor of Westward, in the county of Cumberland, to be appointed for that purpose by the lord of the manor, on Monday, after the feast of Pentecost in every year, and afterwards on each alternate Monday until the feast of All Souls; and then alleges a custom within the said manor, that every liege subject of the realm, exercising the trade or calling of a victualler at a reasonable time before the first day of the fair, has been used and accustomed, and of right ought to enter upon that part of the commons or waste ground which had been set out for holding of the fair, and for the more conveniently carrying on his trade, to erect a booth and stall, and to put and place posts and tables there, and to continue the same so erected, put, and placed until a reasonable time after the last of the said fairs so holden, yielding and paying therefore to the lord of the manor for the time being the sum of 2*d.*, when lawfully demanded. The plea then proceeds to justify the trespasses alleged to have been committed under this custom. The existence of the prescriptive right to the fair is admitted upon the pleadings; and nothing is traversed but the existence of the custom, which custom is found by the jury. And the question before us is, whether the custom is a good custom, or unreasonable, and therefore void in law.

It is an acknowledged principle that, to give validity to a custom,—which has been well described to be an usage, which obtains the force of law, and is, in truth, the binding law, within a particular district, or at a particular place, of the persons and things which it concerns, (see Davy's Reports, 31, 32, *Le Case de Tanistry*,)—it must be certain, reasonable in itself, commencing from time immemorial, and continued without interruption. Now, of these several requisites to the validity of a custom, the only one which is brought in question on the present occasion is, whether the custom is reasonable or not; and this is a question which it belongs to the judges of the land to determine.

The question what customs are reasonable and what are not, is one upon which the books are not altogether silent. A custom is not unreasonable merely because it is contrary to a particular maxim or rule of the common law, for "*consuetudo ex certa causa rationabili usitata privat communem legem.*" (Co Litt. 113 a,) as the custom of gravelkind and borough English which are directly contrary to the law of descent, or, again, the custom of Kent, which is contrary to the law of escheats. Nor is a custom unreasonable because it is prejudicial to the interests of a private man, if it be for the benefit of the commonwealth, as the custom to turn the plough upon the headland of another, in favour of husbandry, or to dry nets on the land of another, in favour of fishing and for the benefit of navigation.

But, on the other hand, a custom that is contrary to the public good, or injurious or prejudicial to the many, and beneficial only to some particular person, is repugnant to the law of reason; for it could not have had a reasonable commencement: as a custom set up in a manor, on the part of the lord, that the commoner cannot turn in his cattle until the lord has put in his own, is clearly bad; for it is injurious to the multitude, and beneficial only to the lord. (Yearb. Trin. 2 H. 5, fol. 24 B. pl. 20.) So a custom that the lord of the manor shall have 3*l.* for every pound

breach of any stranger (21 H. 4;) (a) or that the lord of the manor may detain a distress taken upon his demesnes, until fine be made for the damage, at the lord's will; (Litt. s. 212.) In all these, and many other instances of similar customs which are to be found in the books, the customs themselves are held to be void, on the ground of their having had no reasonable commencement, but as being founded in wrong and usurpation, and not on the voluntary consent of the people to whom they relate.

But the reasonableness of the custom in the present case is not impeached on any ground of this nature. The present custom is, in fact, in favour of the many; and the only party against whom it is set up, and by whom it is now opposed, is the lord of the manor. The grounds upon which this custom is contended to be void on the present occasion appear to be reducible to three.

First, that it is so general that it ceases to be a custom, or pleadable as such, but is part of the common law; secondly, that, by reason of its generality and extent, it cannot be carried into execution, and cannot therefore be considered as a reasonable custom; and, lastly, that the right claimed amounts to a profit à prendre out of land, and cannot therefore be claimed as a customary right.

As to the first objection, admitting, for the purpose of argument, that a custom which would comprehend within it all the liege subjects of the crown would be bad, on the ground of its amounting to the common law, we think the custom before us is not of that description. For in the present custom there are three restrictions which necessarily limit its generality. The parties who claim the benefit of it must be victuallers; they must be victuallers coming to keep the fair; and they must come at the precise period of the year at which the fair is fixed.

Now, under the description of victuallers mentioned in the custom, we cannot consider that very large body of persons to be comprehended who, in ancient times, appear to have been classed under that designation by the statutes referred to in the argument. But we think the plea must be taken to speak in the language of the time at which it is pleaded; and, as the only term used is that of a victualler, it must be understood those only are comprehended who are now so termed, that is, persons authorised by law to keep houses of entertainment for the public. This removes the case at once from the application of the case of *Fitch v. Rawling*, 2 H. Bl. 393, where the custom comprehended all the liege subjects of the crown being in the parish at any time.

But it is said the number of these victuallers may be so large, and the space occupied by each so great, as that the whole portion of the common set out for the fair may be taken by them in exclusion of the rest. If this argument were to prevail, it is manifest that it would be equally applicable with respect to every particular branch of traders who frequent the fair. The sellers of corn, or of cattle, the persons who deposit their cloth, the dealers in earthen ware, and the like, might with equal show of reason be stated by possibility to become occupiers of the whole ground to the exclusion of the rest. But it is obvious that this is not an argument against the custom being reasonable in its original commencement, or against the prescription for the fair being a reasonable prescription: it is an objection only as to the mode of exercising the rights so

(a) This reference is given in *Le Case de Tanistry*, Dav. 33, a. The placitum meant is probably Mich. 21 H. 7. fol. 40, A., pl. 61. See 7 Vin. Abr. 183, Customs, (F) 7, and the references there given. Yearb. Pasch. 21 H. 7, fol. 20 A. pl. 2.

claimed, whether under the custom or the prescription. An inconvenience of this description will provide its own remedy: if it occurs once, it will not be likely to occur again. It is in the highest degree improbable that it should ever occur at all. A little previous inquiry will at all times prevent its recurrence. And in *Bennington v. Taylor*, 2 Lutw. 1517, where it was contended that a prescription was uncertain, and therefore void, which claimed toll for a stall, and the land prope et circa stallam, &c., the objection was not allowed; for this, it was said, "shall be ascertained by the common usage of the fair." And these are precisely the points of consideration to which the judges must advert, when called upon to determine whether the custom is void or not. It is not void as being against law; and, if alleged to be void because inconvenient in a high degree in its enjoyment, and therefore unreasonable, they must look to the probabilities of the case, and be satisfied that the inconvenience is real, general, and extensive, before they hold a custom bad upon that ground, which a jury have found to exist, and to have been acted upon from beyond the time of legal memory.

As to the objection, that this is a bad custom as against the owner of the soil; that all the authorities confine a claim under a custom to matters of easement only, whereas this is a matter of profit in alieno solo, inasmuch as the soil must be disturbed by the erection of the stall; admitting this to be the case, which is left extremely doubtful on the pleadings in this case, yet the distinction between this custom and others to which reference was made is, that it gives a certain profit to the owner of the soil for the use of the same; and whether that is a full compensation or not is not the question. At the early time at which this custom originated, it may have been a profit to the lord, and at all events it may have been an object to him with respect to the profits of his fair to give encouragement to those who would erect booths and stalls for the entertainment of strangers coming to the fair. It is clear that a prescription for a certain toll by way of stallage is good, notwithstanding toll and stallage are different things; as was held in the case of *Bennington v. Taylor*, above referred to; and, if the lord of the fair can justify distraining for such toll under a prescription, there seems no reason why the person who uses the stall on payment of the toll, and who cannot prescribe either in a free estate or in himself and his ancestors, being a stranger, should not justify under such a custom as the present.

The custom, in fact, comes at last to an agreement, which has been evidenced by such repeated acts of assent on both sides from the earliest times, beginning before time of memory and continuing down to our own times, that it has become the law of the particular place.

We therefore think the custom set out on the pleadings is a good custom, and affirm the judgment of Queen's Bench.

Judgment affirmed.

IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

NESBIT against RISHTON.—p. 426.

Under stat 11 G. 4, & 1 W. 4, c. 70, s. 8, error lies to the Court of Exchequer Chamber on judgments given in the Queen's Bench upon error from the Common Pleas at Lancaster.

THIS was a writ of right, brought by the plaintiff in error against the defendant in error, in the Court of Common Pleas, Lancaster, upon which judgment was there given for the tenant. On this judgment error was brought in the Court of King's Bench; and that court in part affirmed and in part reversed the judgment of the Court of Common Pleas, Lancaster (*Rishton v. Nesbit*, 6 A. & E. 103). The tenant brought error in the Court of Exchequer Chamber on the judgment of the Court of King's Bench.

On December 3d, 1838, *Wightman*, for the defendant in error, obtained a rule calling upon the plaintiff in error to show cause why the proceedings on the writ of error should not be quashed for irregularity. The rule was drawn up on reading the writ of error.

Starkie now showed cause. (a) The question is whether sect. 8 of stat. 11 G. 4 & 1 W. 4, c. 70, applies to judgments given in the Court of Queen's Bench on error from a court below. The words are, "writs of error upon *any* judgment given by *any* of the said courts:" and these are large enough to comprehend the case now before the Court. The effect of the section was discussed in *Rex v. Wright*, 1 A. & E. 434, (28 E. C. L. R.) The question there was whether, the Crown not being named in the statute, this Court had cognisance, in error, of indictments; and it was held that it had. That is not a direct authority on the present question; but the language of TINDAL, C. J., is important, as showing the general principle upon which the act should be construed. His Lordship says, "In the case, therefore, of an act of parliament passed expressly for the further advancement of justice, and in its particular enactment using terms so comprehensive as to include all cases brought up by writ of error, we think there is neither authority nor principle for implying the exception of criminal cases, upon the ground that the King, as the public prosecutor, is not expressly mentioned in the act. By such a construction of the act, its object and intent can best be attained." In *Trafford v. The King*, 8 Bing. 204, (21 E. C. L. R.), (b) this point was never made. Stat. 27 Eliz. c. 8, s. 2, gave a writ of error into the Exchequer Chamber in actions "first commenced" in the Court of King's Bench, "other than such only where the Queen's Majesty shall be party." This clause was held inapplicable to cases where the action was commenced by original out of Chancery. (c) Nor could it apply to indictments, on account of the words of limitation. For the same reason, a judgment given in the King's Bench on error from a court palatine was held not to be within the clause. In stat. 11 G. 4 & 1 W. 4, c. 70, s. 8, there are no words of limitation. In *Rex v. Wright* the indictment had been removed from quarter sessions into the Court of King's Bench; though it is true that this was not noticed in the discussion. In *Ricketts v. Lewis*, 2 Cr. & J. 11, (d) an action was brought in the Common Pleas, and, before stat. 11 G. 4 & 1 W. 4, c. 70, removed by writ of error into the King's Bench: and it was held that error did not lie on the judgment of the King's Bench, after the statute. The reason given was that, if such error lay, the Judges of

(a) Before Tindal, C. J., Bosanquet, Vaughan, and Coltman, Js., and Alderson and Gurney, Bs.

(b) S. C. 2 Cr. & J. 265; 2 Tyrwh. 201; on Error from K. B. See *Rex v. Trafford*, 1 B. & Ad. 874.

(c) Note (4) to *Mellor v. Spateman*, 1 Wms. Saund. 346 f.

(d) S. C. 2 Tyrwh. 15. See *Ricketts v. Lewis*, 1 B. & Ad. 197, (20 E. C. L. R.)

the Court of Common Pleas might sit on appeal against a reversal of their own judgment. That does not apply here.

Wightman, contra. If this writ of error lie, there will, in the case of an action brought in a court palatine, or inferior court, be three writs of error, to the Queen's Bench, to the Exchequer Chamber, and to the House of Lords. The intention of the statute was that there should be only two. It seems that sect. 8 of the statute was intended to apply only to the superior courts at Westminster. The evil intended to be remedied was the discordancy in the proceedings. Thus, before the statute, error from the Common Pleas was brought in the King's Bench, and thence error lay only to the House of Lords: error from the King's Bench lay to the Exchequer Chamber, and so on. The statute puts the three superior courts on the same footing. But it cannot have been intended to put inferior courts in the same situation with the superior courts; nor could that be effected by applying the statute. The practice, as regulated by sect. 8, is inapplicable to such a case as the present. "A transcript of the record only shall be annexed to the return of the writ;" and, after the Court of error has given judgment, "such proceedings and judgment, as altered or affirmed, shall be entered on the original record, and such further proceeding as may be necessary thereon shall be awarded by the Court in which the original record remains." But, when error has been brought into the Queen's Bench from the Common Pleas at Lancaster, a transcript only is sent to the Queen's Bench; Wareing's Practice of the Court of Common Pleas at Lancaster, p. 301, 302 (ed. 1836). The Queen's Bench has therefore no means of sending to the Exchequer Chamber a transcript of the record: it could send only a transcript of a transcript. Again, when the judgment of the Queen's Bench is affirmed or reversed, the alteration or affirmance is to be entered on the original record. But, in this case, the Court of Queen's Bench has not the record; and no regulation is made enabling that Court to transmit to the Court below the judgment of the Court of error. [BOSANQUET, J. Is it not said that, in contemplation of law, the record itself is removed?(a) I may venture to say that the great object of the framers of the act was to obtain the opinions of as many of the Judges of the superior courts as possible before the case was taken to the House of Lords, in order to show whether it was worth while to take it thither. ALDERSON, B. It was meant also to put the three courts upon the same footing, as to writs of error; which was formerly not the case.] It seems also to have been an object that writs of error from the judgments pronounced in the King's Bench upon actions commenced by original, should not go to the House of Lords in the first instance. [BOSANQUET, J. It has been said that the Court of King's Bench would allow discussion on a bill of exceptions filed upon the trial of one of its own records to be discussed in banc there, in order that the plaintiff in error might not be forced into the House of Lords in the first instance.(b)] *Ricketts v. Lewis*, 2 Cr. & J. 11, S. C. 2 Tyrwh. 15, is directly in point. The rule was there laid down generally, that the statute applied "only to cases originally com-

(a) See *Richardson v. Mellish*, 8 Bing. 384, 346, (11 E. C. L. R. ;) *Mellish v. Richardson*, 7 B. & C. 819, (14 E. C. L. R. ;) 9 Bing. 125, (23 E. C. L. R. ;) *Rez v. Carlile*, 2 B. & Ad. 971, (22 E. C. L. R. ;) *Salter v. Slade*, 1 A. & E. 608, (28 E. C. L. R. ;) *France v. Parry*, 1 A. & E. 615.

(b) Note (a) to *Gardner v. Baillie*, 1 B. & P. 32.

menced in the court to which the writ of error was directed." It is true that the propriety of the decision was illustrated by an argument which does not necessarily apply here; but the same difficulty would arise, in a case like the present, if the Judges of assize for the county palatine were either Judges of the Common Pleas or Barons of the Exchequer. [TINDAL, C. J. There would be two only to revise their own decision, not five. ALDERSON, B. The objection would arise on error being brought in the Queen's Bench, if the judges of assize for the county palatine were Judges of the Queen's Bench.] In *Rex v. Wright* the question was merely whether the Crown was bound. There the proceedings had been removed by certiorari from the sessions: but the only judgment was in the Court of King's Bench; and the record was there.

TINDAL, C. J. The words of the eighth section are free from all ambiguity. In terms, they extend to "any judgment given by any" of the three superior Courts at Westminster. These words in themselves include, not only judgments in causes originally commenced in such courts, but all judgments given by those courts. Unless, therefore, some manifest inconvenience be shown to result from such interpretation, or some subsequent clause introduce an inconsistency therewith, the natural construction of the words is to be adopted; and that is, to hold that the clause applies to judgments on writs of error, as well as to original judgments. Three objections are made. First, that, on this construction, there will be three writs of error upon judgments pronounced in the county palatine. I agree that this was a consequence not intended by the legislature; but it is a consequence incidental to putting the act into execution according to its legal construction. Perhaps the legislature did not contemplate the case at all. But, notwithstanding this result, whether we consider the question of delay or that of expense, this construction is more beneficial to the suitor than one which would compel the plaintiff in error to resort at once to the House of Lords upon the judgment given in the Queen's Bench. Secondly, it is objected, that the judges of assize for the county palatine may be Judges of the Common Pleas or Barons of the Exchequer, so that they would, in this Court, have to decide upon an appeal from their own decision; and that the case is thus brought within the difficulty pointed out in *Ricketts v. Lewis*. That observation, however, would apply to every case of error brought upon the judgment pronounced on a bill of exceptions, where the judge who is excepted against may, and often does, sit in the court of error: but in the case referred to, which is never likely to occur again, the difficulty was that the Court of Common Pleas would have been made substantially to sit in error in the case of their own judgment. Thirdly, it is said that the latter part of the clause can apply only where the action was originally commenced in the court to which the writ of error is sent. But, if we look at the course pursued in proceedings on writs of error, we shall find that the difficulty suggested does not arise. Before the passing of the late statute, the record itself was always considered in law as sent up by the inferior to the superior court, although undoubtedly, in point of practice, a transcript only was sent up, and the original record remained below. (a) The clause in question has made it compulsory, in the case of judgments given by the Courts of Westminster, "that a transcript of the record only shall be annexed to the return of the writ," and the original record shall

(a) See *Sampayo v. De Payba*, 5 Taunt. 88, (1 E. C. L. R.)

remain below. And accordingly, in the present case, a transcript only of the proceedings and of the judgment pronounced by the Court of Queen's Bench has been brought up to this Court by the writ of error, the original proceedings remaining in that court. There seems, therefore, no real difficulty in applying the directions at the close of the eighth section to the circumstances of the present case: for this Court may "review the proceedings, and give judgment as they shall be advised thereon; and such proceedings and judgment, as altered or affirmed," may "be entered on the original record, and such further proceeding as may be necessary thereon" may "be awarded by the Court in which the original record remains," in the same manner as those further proceedings used to be awarded and take place, before the statute was passed, in cases of writs of error from the superior Courts and the Court of Queen's Bench. What difficulty does this create, in the case of error upon a judgment of the Court of the county palatine, which would not exist also in the case of error upon an original judgment of any superior Court of Westminster Hall? Therefore, on the whole, we find that this writ of error lies, according to the spirit of the act: and I am glad to find that such a construction is also within the language.

The rest of *The Court* concurred.

Rule discharged.

Note.—After this judgment was pronounced, the officer of the Court inquired to what day the Court would adjourn. The Court then stated that it was proposed, for the future, to adhere to the following arrangement, in all cases where there was to be an argument. That, on the first Monday after every term, except Easter term, the Court of Error from the Queen's Bench shall sit, and shall go on, from day to day, throughout the week, till the business pending shall be disposed of. That, on the second Monday, the Court of Error from the Common Pleas shall sit, and go on in like manner. That, on the third Monday after term, the Court of Error from the Exchequer shall sit, and go on in like manner. No arguments shall be heard in the Court of Error between Easter and Trinity terms. The above arrangement not to apply to cases where the Court pronounces judgment on cases argued at former sittings and standing over for judgment.

Second Year of the Reign of Victoria.—1839.

WILLIAMS, J.
COLERIDGE, J.

Sir JAMES ALLAN PARK died in Michaelmas vacation, 1888, and the Right Honourable THOMAS ERSKINE, Chief Judge of the Court of Bankruptcy, was appointed a Judge of the Court of Common Pleas in his stead, having first been called to the degree of the coif, when he gave rings with the motto "*Judicium parium.*"

Following cases (argued in Michaelmas vacation) are reported
 of the Middle Temple, Esq., Barrister-at-law.

MAYOR, ALDERMEN, AND BURGESSES OF THE
 LIVERPOOL.—p. 435.

able and rated to the relief of the poor, in respect
 of 5 & 6 W. 4, c. 76, (for the Regulation of Municipal

appropriating all the corporate funds to purposes of a public
 from further rateability

a rate for the relief of the poor of the parish of
 the appellants were rated as follows:—Town dues
 bridge dues 584l.: the sessions confirmed the rate, subject
 of this Court on the following case.

Several properties rated are the revenue of the Municipal Cor-
 poration of the Borough of Liverpool, collected by their officers, (who
 are paid by salaries,) and by them paid over to the treasurer of the bo-
 rough, to the account of the borough fund. Before the passing of the
 Municipal Corporation Act, 5 & 6 W. 4, c. 76, these properties were
 rated to the relief of the poor, which rating was always acquiesced in,
 and these properties are still rateable to the poor, unless they are exempt
 under the operation of the above Act. The question for the opinion
 of the Court is, whether the mayor, aldermen, and burgesses of the
 borough of Liverpool are still rateable to the relief of the poor in
 respect of these properties. If the Court shall be of opinion that the
 appellants are not so rateable, then the rate to be amended by striking
 out the said properties and the names of the appellants.

The case was argued at the sittings in banc after Michaelmas term
 last. (a)

Cresswell, Henderson, and Greaves, in support of the rate. It is not
 disputed that the corporation is rateable unless exempted by the opera-
 tion of 5 & 6 W. 4, c. 76. Sect. 92 provides that the rents and profits
 of all hereditaments," and the "annual proceeds of all moneys," &c.
 belonging or payable to the corporate body, shall be paid to the trea-
 surer of the borough, and carried to the account of the borough fund.
 The rents and profits intended, are the *net* rents after payment of all
 outgoings. The legislature did not mean to deprive the poor of their
 interest in the corporate property, but to point out the future applica-
 tion of the surplus profits, and to make the corporation trustees for the
 purpose of such application. The rateability of the corporate property
 tends to reduce the burden of the rate upon others, and thus operates
 to the benefit of the borough, which is one of the avowed objects of
 the act; but it cannot have been meant to benefit the borough at the
 expense of the parish, especially as the two are not found to be co-
 extensive. The expression "annual proceeds," seems to imply that
 annual charges are to be deducted, otherwise the word "annual" is

(a) September 1st, 1838. Before Lord Denman, C. J., Patteson, Williams, and Cole-
 ridge, Js.

superfluous. The word "profits" is explained by *Rex v. Joddrell*, 1 B. & Ad. 403, 407, (20 E. C. L. R.,) to mean the "average annual profits, after every outgoing is paid." In wills and other instruments it has been construed to mean net profits. If an exemption had been intended, it would have been declared in express terms, and not left to be inferred from an affirmative statute passed entirely *alio intuitu*. It will be contended that this is now become a public fund applicable to public purposes only, and therefore no longer rateable; *Rex v. Commissioners of Salter's Load Sluice*, 4 T. R. 730. In that case neither any particular place nor person was benefited, but the public in general; and the same act which created the toll was also held to exempt it from rates. In *Rex v. Liverpool*, 7 B. & C. 61, (14 E. C. L. R.,) the dues were solely applicable to a public dock and harbour used by all the world; and in *Rex v. The Trustees of the River Weaver Navigation*, 7 B. & C. 70, note (c), the tolls were appropriated by parliament to the repair of county bridges and public highways. Here the borough fund is to be applied to purposes of a local and private nature. These are, 1. The payment of debts: an act to compel the corporation to pay its debts cannot be considered as giving a public character to its revenues; nor is it necessary that the debts should have been incurred for the public benefit. 2. The payment of the salaries of the mayor and other officers: These are all strictly private purposes. 3. The surplus is to be spent for the "public benefit of the inhabitants, and improvement of the borough." Under this power the corporation may purchase rateable property; they may erect public buildings or lay out a square or a market, which would be rateable, *Rex v. Gardner*, Cowp. 79. Then why should not the fund, out of which such expenses must be supplied, be itself rated? The act does not authorize a borough rate for mere improvements, thereby intimating an intention that the subject should not be taxed for such purposes; yet if a surplus shall result in consequence of ~~an~~ exemption from rateability, the deficiency in the rate must be made up by the parishioners, and thus the parish will be indirectly taxed for improvements. Even if some of the purposes specified in sect. 92 be admitted to be of a public nature, as the expenses of prosecuting offenders, &c., yet a partial application of property to such purposes has never been held to be a ground of total exemption. *The Attorney-General v. Aspinall*, 2 Myl. & C. 613, shows that the benefit intended by the act is that of the borough only, which is not strictly a public benefit like that derived from bridges, highways, or harbours. Property is not the less liable to assessment because it is held in trust for certain specified objects or persons: *Rex v. Tewkesbury*, 13 East, 155, *Rex v. Agar*, 14 East, 256, *Rex v. St. Giles, York*, 3 B. & Ad. 573, (23 E. C. L. R.,) *The Governors of the Bristol Poor v. Wait*, 5 A. & E. 1, (31 E. C. L. R.,) *Rex v. Mayor, &c., of York*, 6 A. & E. 419, (33 E. C. L. R.,) The exemption of public property has been put on the ground of the impossibility of finding a beneficial occupier; but here the occupation is admitted.

Wightman and Murphy, contra. *The Attorney-General v. Aspinall*, cited on the other side, is in fact an authority to show that this is a public fund held in trust for public purposes. The Lord Chancellor there says, "I cannot doubt that a clear trust was enacted by this act for public, and therefore, in the legal sense of the term, charitable purposes, of all the property belonging to the corporation." *The Attorney-*

General v. Wilson,^(a) has been since decided in conformity with *The Attorney-General v. Aspinall*. "Profits" mean all sources of income; and it matters not that they are received by collectors and paid into the hands of the treasurer; they are still corporate funds in the hands of corporate officers. The destination of those funds to public objects, by statute, exempts the receiver from rateability. There is no beneficial occupation where an act of parliament disposes of the whole: *Rex v. Liverpool*, 7 B. & C. 61, (14 E. C. L. R.,) *Rex v. Commissioners for lighting Beverley*, 6 A. & E. 645, (33 E. C. L. R.) If the corporation is rateable, then, in the event of the expenses of the corporation absorbing the whole fund, (and a deficiency may be supposed, whatever the fund may be,) there must be a borough rate to pay the poor-rate, and the case would resemble the one suggested by the Court in *The Governors of the Bristol Poor v. Wait*, 5 A. & E. 1, (31 E. C. L. R.,) of parish officers rating premises occupied by their own poor. In the case of the lunatic asylum^(b) and other charitable institutions, the application of the funds was purely voluntary. [COLERIDGE, J. The trustees were there compellable to apply them to the objects of the charity.] But the subscribers were not so bound. The corporation, in this case, is a mere instrument for municipal purposes, for the due execution of which the act carefully provides; thus an account is to be rendered annually to a secretary of state, stat. 6 & 7 W. 4, c. 104, s. 10; and orders for payment out of the borough fund may be removed into this Court by certiorari, 1 Vict. c. 78, s. 44.

Lord DENMAN, C. J., now delivered the judgment of the Court.

This was an appeal against a rate made for the relief of the poor of the parish of Liverpool, upon certain properties which are the revenue of the municipal corporation of the borough of Liverpool, and which, before the passing of the Municipal Corporation Act, (5 & 6 W. 4, c. 76,) were rated to the relief of the poor, and, as the case states, are still liable to be so, unless they are exempted by the operation of that act.

This question, which now comes before us for the first time, depends upon the construction of the 92d section, and the effect to be properly attributed thereto. By that section it is enacted, that "the rents and profits of all hereditaments, and the interest, dividends, and annual proceeds of all moneys, dues, chattels, and valuable securities belonging or payable to any body corporate named in conjunction with the said borough in the said schedules A. and B., or to any member or officer thereof in his corporate capacity, and every fine or penalty for any offence against this act, (the application of which has not been already provided for,) shall be paid to the treasurer of such borough, and all the moneys which he shall so receive shall be carried by him to the account of a fund to be called 'The Borough Fund.'"

Such is the description of that which is to constitute the fund, and upon the language of it, and more particularly upon the meaning of the word "profits," much criticism was employed in the course of the argument. We, however, attribute little importance to those remarks; first, because the particular meaning which may have been attached to it in the instruments to which reference was made, probably depended entirely upon the context; and, further, we are perfectly satisfied that the language is used in its ordinary and popular sense, and that the meaning

(a) Cited, 2 Myl. & C. 634, note (a).

(b) *Rex v. St. Giles's, York*, 8 B. & Ad. 573, (30 E. C. L. R.)

is, that the whole income of the corporation, from whatever sources arising, shall constitute "The Borough Fund."

Then comes the direction as to the uses and purposes for which the fund is to be applied; and it is declared that the same, subject to the payment of the debts owing by the corporation at the time when the act passed, or of so much as the council (that is, the new council) should think it expedient to redeem, and to the interest of such debt, was to be applied to the payment of the salaries of certain officers, expenses of borough elections, sessions, and prosecutions, gaols and corporate buildings, police, and all other expenses incident to carrying the act into effect, and in case of a surplus, that such surplus was to be applied under the direction of the council *for the public benefit of the inhabitants, and the improvement of the borough*. Then follows a provision, in case of a deficiency for the purposes aforesaid, that the town council may raise the deficiency by a borough rate in the nature of a county rate.

The question, therefore, comes to this, what is the state of the case as to the rateability of property similarly circumstanced? Because, if we find the principle settled by decisions already made, we feel it to be our duty to act upon them, and not upon the apprehension of any inconvenient or unforeseen consequences, to question or weaken their authority. Now, in the case of *Rex v. The Inhabitants of the Parish of Liverpool*, 7 B. & C. 61, (34 E. C. L. R.), certain trustees, in whom the dock estates in the same parish were vested, were rated in respect of "the annual value and profits" of the same; and property (otherwise rateable) was there held not to be so, because the rates and duties payable by act of parliament were to be applied to the payment of debts, and to the "making, erecting, building, finishing, and maintaining docks, basins, piers, and other works and buildings in the port of Liverpool." In that case, therefore, the application of the tolls or rates (which otherwise, as we have just observed, must have been as much rateable as a mileage rate upon a canal) in the manner above described, exempted them from rateability. And in the case of *Rex v. The Trustees of the River Weaver Navigation*,^(a) which was under the consideration of the Court at the same time as the case just cited, property (as in that case, clearly rateable) was held to be exempt on account of the uses and purposes to which the profits were applicable. There the rates and duties, after payment of expenses, &c., were directed to be employed in the repair of bridges, and in aid of other public charges upon the county; and the Court decided that the principle of the former disposed also of the latter case. They held that the repairing and maintaining bridges and highways were *public purposes*, and that, as no part of the moneys received could be applied to *private purposes*, they were therefore not rateable in the hands of the trustees.

We feel it to be impossible substantially to distinguish these cases, and especially the latter, from the present. The extent and approximation to something like national benefit are in kind, and almost in degree, the same. The public, in the one case, is the same town of Liverpool; in the other, the county of Chester.

The case of *The Attorney-General v. Aspinall*, 2 Mylne & Craig, 613, in which this very borough fund was under consideration, was cited by the learned counsel on both sides. The main question, however, seems there to have been, whether the corporate property was trust property,

(a) *Rex v. Liverpool*, 7 B. & C. 70, note (c).

so as to come under the jurisdiction of the Court of Chancery; and it is probable (though it is wholly unnecessary to express any opinion) the same decision might have been made, if the property had been comparatively of a much more private nature. But we have the satisfaction of observing, that the view which we have taken of the earlier part of the 92d section, is expressly adopted by the Lord Chancellor. For his Lordship, in describing (not giving the words of) that section, comprehends "the rents, profits," and other sources of revenue therein enumerated, by the general expression of "all the income of" the corporate "property."(a)

In coming to the conclusion at which we have arrived, we certainly feel that, whatever may be the effect in the present instance, in many boroughs consisting of several parishes the proportion and rate of contribution may be materially disturbed. We think it also extremely probable, that the effect of this section upon the rateability of corporate property was overlooked altogether.

Our business, however, is with the construction of the statute, and not with consequences; and the remedy, if any be requisite, must be by the legislature.

The result of our opinion is that the order of sessions must be quashed.

S.

Order of sessions quashed.

(a) P. 619.

The QUEEN against The Chamberlains, Common Council, and Freemen of ALNWICK.—p. 444.

By immemorial user, and grants of various dates by the lords of the soil to the corporation of A., the freemen of A. and their widows were entitled to have common of pasture and turbary in A. moor, paying a fixed rent, and to cut peat, furzes and brushwood, with liberty to get limestone, slate and freestone, to dig clay, burn bricks, take flags, whins and wattles, to dig and take sand, gravel, and marle for the use of the freemen in certain parts of the moor, and to erect lime-kilns and herds' houses where the lord's bailiff and the corporation should think fit. The corporation made by-laws to regulate the stints, appointed inoor grieves to enforce them by distress, &c., and persons to hoe and burn whins, gather stones, and drain and sow grass. The lord of the soil had a right to grant licenses to make bricks, get clay, make wash-pools and win ironstone, coals, and limestone, but not to grant the herbage of the moor; nor did he depasture cattle there: Held, that the interest of the freemen was substantially that of commoners only, and that the corporation was not rateable to the poor in respect thereof.

On appeal against a poor rate for the parish of Alnwick, wherein the "chamberlains, common council, and freemen of the borough of Alnwick" were assessed as the occupiers of "land" within the parish, the sessions confirmed the rate subject to the opinion of this Court upon a case of which the following were the material facts.

The town of Alnwick is an ancient borough and corporation by prescription, by the name of the Chamberlains, Common Council, and Freemen of Alnwick. The common council consists of twenty-four freemen elected for life from whom four chamberlains are annually chosen. The management of the affairs of the corporation is vested in the chamberlains and common council. Near the town is an unenclosed tract of between two and three thousand acres called Haydon Forest or Alnwick Moor, on which the freemen and their widows, resident within

the parish, have from time immemorial been entitled to certain rights set forth in the following documents.

1. A charter, without date but supposed to be of the date of Henry II., containing a grant by William de Vesci to his burgesses of Alnwick and their heirs to have common of pasture in Haydon and in the moor of Haydon.

2. Another, supposed to be of the date of Edward I. by W. de Vesci, grandson of the above, containing a confirmation to the burgesses of all the liberties and free customs granted by the king to the burgesses of Newcastle, and also common of pasture in Haydon, &c., as in the charter of his grandfather.

3. Another, of the date of 1290, by a son of the last, of which the following is a translation.

"Know all present, and to come, that I, William de Vesci, brother and heir of John de Vesci, have given and granted, and by this my present charter have confirmed to my burgesses of Alnwick, all the liberties and free customs in all things as the charter of William de Vesci my father, which they have from him, more fully testified. I have also given and granted to the same my burgesses some parcels of land in the field of Bondgate, which are called Scottefeldhalch and Ranwells Strother with all their appurtenances, with common in Haydon, and with all the privileges in Haydon Moor in the marshes, feeding and pasture grounds, with liberty to get peats, turves, and brushwood, and with all the other their free appurtenances and privileges which they were wont to have and to use in the times of my ancestors, as well in the forbidden month as in others. And it must be known that on the northern part of the way from Bolton, which is called Boultonstrete as far as the path which is called Colliergate, cultivation shall by no means be used by any one before it be granted by me and the said burgesses, which cultivation may be used within the said bounds for my accommodation and the accommodation of the said burgesses by united consent, and the whole pasture in the same place shall remain jointly and in common to me and the said burgesses. In testimony whereof I have put my seal to this writing, and my said burgesses, in confirmation thereof, have put their common seal to the other part of this writing, which is to remain in my possession; and it must be known that the same burgesses and their heirs, for the privileges which they are to have in Haydon in the forbidden month with their liberties, shall give me and my heirs two shillings annually, namely, one-half at the feast of St. Martin and the other half at Pentecost for ever."

In 1700 the corporation made various enclosures from Haydon Forest or Alnwick Moor, which were divided into several farms.

4. In 1762, articles of agreement under the seals of the parties, and under the corporate seal, were entered into, to which Hugh Earl of Northumberland and Elizabeth his wife, and certain servants of the earl of the one part, and amongst others the Chamberlains and common council, on behalf of themselves and the freemen of Alnwick, of the other part, were parties. The articles recited a bill in Chancery exhibited by the Earl and Countess against the corporation, to establish the rights of the former to the soil and inheritance of the moor, and to restrain the latter from enclosing any part of it, or digging mines or quarries in it, and they set forth the mutual covenant and agreement of the parties to the following effect:—That the chamberlains, and all offi-

cers of the borough and forest of Haydon or Alnwick Moor, should be sworn at the lord's court leet before they entered upon their office. That the freeman's oath should be in a prescribed form, including allegiance to the king and fealty to the lord and lady of the manor. That the Earl and Countess were lord and lady of the manor and borough of Alnwick, and that the forest of Haydon or Alnwick Moor lies within the manor, and is parcel of it; that the freemen were entitled to common of pasture thereon, on payment of the rent of 2s. per annum for the liberty of depasturing thereon in the fence month, and that freemen and their widows had a right to dig and cut peat, furzes, turves, and brushes growing there for their own use; and that the lord and lady had no right to grant the herbage or vesture of the forest or moor to their tenants holding by burgage tenure, or any other person whatsoever. That no freeholder, unless also a freeman, had any right in Alnwick Moor. That certain enclosures therein described, being part of the said forest or moor, should be established to the corporation, and continue to be let by and for their benefit, but that no new enclosures should be made without consent of the lord and lady: that the soil or royalties in the forest or moor, and in the enclosures made therefrom, should be vested in the Earl and Countess and their heirs: that the Earl and Countess should let the coal-mines and quarries to the corporation, saving the right of the Earl, &c., to get coal and stone for his own use. That the freemen and their widows should have liberty at all times to get limestone, slate, and freestones in any of these quarries for their own use, and to dig clay, burn bricks, take away turves, and flags, whins and wattles; and to dig and take away sand, gravel, clay, and marle, for the use of themselves or other freemen, &c., in such parts of the forest or moor as the lord's bailiff of the borough and the chamberlains should think fit. That the limekilns and herds' houses in the forest or moor should continue for the use of the freemen, with liberty to erect others where the lord's bailiff and chamberlains should think fit. That reasonable satisfaction should be made from time to time to the corporation or their lessees, for damage done by working mines, &c., within the enclosures. The articles then proceeded to ascertain the boundaries of the forest or moor; and, in exchange for a portion of the moor severed therefrom, to be enjoyed by the Earl and Countess as their separate freehold, it was provided that a portion of land should be set off from the separate freehold of the Earl and Countess, and laid to the moor, to be held and enjoyed by the freemen of Alnwick, as part of the moor.

The ground so laid to the moor in virtue of the above articles is still enjoyed by the freemen.

5. In 1811, a further indenture was executed between the Duke of Northumberland of the one part, and the Chamberlains and common council under the corporate seal of the other. After reciting that the Duke was seised of certain freehold pieces of ground, and that freemen of Alnwick were entitled to common of pasture and other rights upon the forest of Aydon or Alnwick Moor upon payment of the rent of 2s. per annum to the Duke for the liberty of depasturing their cattle thereon in the fence month, and that an exchange had been agreed upon, it witnessed that the Duke granted to the Chamberlains and common council, in trust for themselves and the rest of the freemen for the time being, right of common or depasturing in and upon the said pieces of ground adjoining the moor, together with all such other privileges and rights in

and upon them as the Chamberlains, common council, and freemen were entitled to in and upon or over the said forest or moor, to be enjoyed in like manner as on the said forest or moor; and the Chamberlains and common council, on behalf of themselves and the rest of the freemen, released to the Duke and his heirs all their right of common, and all other their right and interest, of, in, and to a piece of ground parcel of the said forest or moor.

The pieces of freehold over which the Duke granted the rights mentioned in the last indenture, and which were in 1811 part of an enclosed field, are now open and enjoyed by the freemen like the rest of the moor.

The Duke is lord of the soil and royalties of the moor, and grants licenses to make bricks, get clay, make washpools, and win iron-stones, coals, and limestone. His right to do so is not disputed. About three years ago, he granted to the Chamberlains, common council and freemen license to make a permanent washpool on the moor for washing their sheep, and to erect a pen with stone walls. The Duke's bailiff accompanies the new freemen, when riding the boundaries of the moor.

6. In 1838, the Duke, as impropiator of the tithes of Alnwick, demised to the corporation for ten years the agistment tithes in respect of cattle depastured on the enclosed lands of the corporation within the manor and borough of Alnwick, including the enclosure made from the moor, as also in respect of cattle depastured on the moor, on which the freemen are stated in the lease to be entitled to common of pasture.

The rent of 2s. a year is regularly paid to the Duke for the liberty of depasturing the moor in the fence month, and the receipt, which is yearly given, expresses that sum to be "received of the burgesses of the borough of Alnwick," for such license.

The enclosures made from the common by the corporation before 1762, and referred to in the articles of that date, contain 700 acres and upwards, and are let to tenants, whose rents are received and applied by the common council for the benefit of the corporation. One of the leases was set forth in the case, by which it appeared that the corporation in such lease reserved all mines, quarries, woods, trees, &c., with liberty to work, fell, lop, &c., and to enter when perambulating the boundaries of Aydon Forest, "the said premises being part and parcel thereof."

The tenants of these enclosures are rated to the poor's rate; but the unenclosed land called Haydon Forest or Alnwick Moor has never before been rated. The freemen put their cattle on the moor without any permission asked, or any payment made to the corporation for the exercise of the right. Each freemen pays tithes of lambs or wool to the tithe owner for his own stock, and the rent reserved in the lease of agistment tithe is paid to the Duke by the Chamberlain's clerk. The corporation do not occupy or turn cattle out on the moor, except as individual freemen. The cattle of non-freemen, trespassing on the moor, have been, on several occasions, impounded by individual freemen.

No profit arises to the corporation, in their corporate capacity, from the moor; but the Chamberlain and council make by-laws for regulating the stints to be depastured by the freemen. The case set forth a by-law for this purpose made in 1824, in which (inter alia) the number and nature of the stints were regulated, and the times and places for depasturing cattle were fixed, and the moor grieves of the borough were em-

powered to distrain all cattle or goods found depasturing or being in or on the moor in contravention of the order.

The regulations prescribed in this by-law have always been observed.

The moor grieves are servants of the Chamberlain and common council, who also appoint the herd. The latter resides in a house for which he is rated, and the rates are paid by the Chamberlain's clerk. He has four stints in the forest, whether a freeman or not, and has established his right to them by an action at law. The Chamberlains and council often employ persons to hoe and burn the whins and furzes on the unenclosed parts of the forest, to gather stones, drain, and sow grass seeds. No cattle belonging to the duke are depastured on the moor.

It was as the alleged occupiers of this moor that the appellants were rated, and the sessions, upon the above evidence, "were of opinion that the corporation were in such occupation of the herbage of the moor, as trustees for the freemen, and for their benefit, as rendered them liable to be assessed to the rate."

The questions for the opinion of the Court were, whether there was any rateable occupation of Alnwick Moor in respect of the aforesaid rights or privileges enjoyed by the freemen of Alnwick? whether the occupation of the same was properly described and assessed in the rate as land? and whether, if there was such a rateable occupation, the rate was properly made upon the appellants?

The case was argued at the sittings in banc after Michaelmas term last.(a)

Talfourd, Serjt., *Ingham*, and *Otter*, in support of the order, contended that, whatever may have been the right originally intended to be conveyed, the corporation had, in fact, exercised and obtained rights of an exclusive nature, greater than a mere right of common or incorporeal hereditament; and that the corporation had a possession sufficient to maintain trespass quare clausum fregit. They cited *Rex v. Bell*, 7 T. R. 598, *Burt v. Moore*, 5 T. R. 329, *Potter v. North*, 1 Saund. 350, *Rex v. Ellis*, 1 M. & S. 652, *Rex v. Watson*, 5 East, 480, *Rex v. Sudbury*, 1 B. & C. 389, (8 E. C. L. R.,) *Jones v. Richard*, 5 A. & E. 413, (31 E. C. L. R.,) *Dyson v. Collick*, 5 B. & Ald. 600, (7 E. C. L. R.,) *Crosby v. Wadsworth*, 6 East, 602, *Rex v. Mayor and Commonalty of York*, 6 A. & E. 419, (33 E. C. L. R.) It was also contended that general ability, derived from any property within the parish, made an inhabitant rateable, and that the sessions, having expressly found that the appellants were occupiers, had precluded further inquiry.

Sir *F. Pollock*, *Wightman*, and *Granger*, contra, relied upon *Rex v. Churchill*, 4 B. & C. 750, (10 E. C. L. R.,) *Rex v. Aberavon*, 5 East, 453, *Rex v. Tewkesbury*, 13 East, 155, and contended that the right was only common of pasture and turbary; that some of the acts done might be evidence of a right to the soil, but did not conclusively show it; that there was no beneficial occupation by the parties rated; that the finding of the sessions, in point of form, and under the circumstances, was not conclusive; and that the subject-matter of the rate was at all events improperly described as "land."

Lord DENMAN, C. J., now delivered the judgment of the Court. After stating the cause of appeal, his lordship said: The court of quarter

(a) December 1st, 1838. Before Lord Denman, C. J., Patteson, Williams, and Colledge, Js.

sessions for the county of Northumberland confirmed the rate subject to the opinion of this Court upon a case which states the facts hereinafter, &c., noticed, and at the conclusion—"that the sessions were of opinion that the corporation were in such occupation of the herbage of the Moor as trustees for the said freemen, and for their benefit, as rendered them liable to be assessed to the rate." We notice this at the outset, because, generally speaking, this finding of the sessions would have been conclusive upon the question. In this instance, however, from the long statement of facts submitted to our consideration, it is impossible not to perceive that the finding of the sessions was merely formal, and that their real object was to procure our opinion, whether the facts stated warrant their conclusion or not. The principal question accordingly (and into which alone it is necessary for us to enter) is, whether the interest of the appellants in the district (of from 2000 to 3000 acres) called Aydon or Haydon Forest, or Alnwick Moor, in the neighbourhood of the town of Alnwick, be of such a nature as to make them liable to be rated. It is material to observe thus early, that it is found as a fact that the Duke of Northumberland is lord of the soil and royalties of the said moor; and if that finding needed any confirmation, it would have received it from the fact of his having recently granted a written license to erect a permanent wash-pool thereon. It is obvious, also, that the original grants to the burgesses of Alnwick were plainly of a right of common, and of that right only: hence this important consideration arises, that the burthen is clearly cast upon those who contend that some larger interest in the soil than a mere right of common is vested in the appellants, to show how and when such enlarged interest accrued.

The two first grants are from the family of De Vesci, then lords of the manor of Alnwick, and supposed to be about the dates of Henry the Second and Edward the First respectively, "of common of pasture in Haydon, in the manor of Haydon, to their burgesses of Alnwick." The third grant to the said burgesses of the date of 1290 by the son of the second grantor is of certain lands (not material to the present purposes) "with common in Haydon and with all the privileges in Haydon Moor in the marshes, feeding, and pasture grounds, with liberty to get peats, turves, and brushwood, and with all other their free appurtenances and privileges which they were wont to have and to use in the times of my ancestors, as well in the forbidden month as in others," for which enlarged privilege during the fence month 2s. annually were to be paid, and the same (as the case states) is regularly paid to the lord at this day.

From the two earlier grants, therefore, common of pasture only, and by the third common of turbary in addition, with an extension of all the privileges over the fence month, were given to the burgesses; and the payment of the 2s. annually, as already mentioned, amounts to a direct acknowledgment of the force and validity of the said grant of 1290, by which unquestionably no right in the soil, of a higher nature than that of common of pasture and turbary, passed to the burgesses.

Nor do we think that from the more modern deeds and instruments introduced into the case, any inference of a contrary tendency can be fairly deduced. That of 1811 was for the purpose of effecting an exchange between the Duke of Northumberland and the chamberlains, common council, and freemen of Alnwick "of a certain portion of enclosed land belonging to the duke adjoining to Aydon Forest, or Aln-

wick Moor, for a certain portion of the said forest or moor." And it is to be observed, that what is thereby professed to be relinquished to his Grace, is not land, but "all the right of common and depasturage, and other right, title, claim, and interest of the said chamberlains, &c., of, in, and to the piece of ground in question." The last in order, and the most recent in date, is the deed of 1833, whereby the duke, as impropiator of the tithes of the manor and borough of Alnwick, for a rent of 1s., leased, during a term of ten years, the agistment tithes payable in respect of cattle depastured (amongst other places) upon the said moor, on which the freemen of Alnwick are therein stated to be entitled to common of pasture.

We have, purposely, omitted the articles of agreement of March, 1762, though of earlier date than the two deeds lastly noticed, because they have reference, especially, to the enclosure of upwards of 700 acres of the moor about the year 1700, a fact to which considerable importance seems to have been attached, though, with the accompanying explanation, it appears rather to operate in favour of the appellants. That such enclosure was made upon any exercise or claim of right is certainly not shown; that it originated in encroachment and usurpation there is every reason to conclude.

The said articles of agreement made between the Earl and Countess of Northumberland, and the chamberlains, &c., of Alnwick, after reciting that a bill had been filed by this said earl and countess against the said chamberlains (amongst other things) to quiet the right of the former to the soil and inheritance in the place in question, and to restrain the latter from letting or enclosing any part of the same, went on to adjust between the parties, that the said enclosure of 700 acres should stand, but that no further enclosures should be made; and that the soil and freehold were to be vested in the said earl and countess, as from the earlier documents it is quite clear they were before. Since, therefore, the Duke of Northumberland is stated expressly to be lord of the soil, and that there is no reason for concluding that the part of the moor enclosed was under different circumstances from the rest, and the chamberlains, &c., formally stipulate to enclose no more, it seems clearly to follow that they had no right to enclose at all: for if they had, why should they renounce it?

It must certainly be conceded (as was pointed out in the argument) that very large and, with reference to commons generally, unusual rights are, by these same articles, conceded or admitted to belong to the freemen; such as the liberty to disturb the surface by digging for clay and gravel, and to cut down whins, wattles, &c., upon the surface; and in other respects also (as appears by the case) they have interfered with it. Seeing, however, as we think we do distinctly, the original relation of these parties to each other, to have been that of lord and commoner, and that there is nothing in any subsequent deed or instrument to satisfy us that the quality and extent of the interest of the freemen has since been varied, we think that the nature of their rights is still—as, at first, it is shown to have been—that of commoners, though with large and (as we have before observed) unusual enjoyments upon this moor.

In coming to this conclusion upon the facts of this case, we have, in effect, disposed of it; because it was not contended in argument (and could not have been with any prospect of success) that, unless the interest of the appellants in this tract of land was something more than an

incorporeal hereditament, the rate could be sustained. It is not needful, therefore, to do more than observe generally as to all the cases cited in the argument (*Rex v. Watson*, 5 East, 480, *Rex v. Aberavon*, 5 East, 453, *Rex v. Tewkesbury*, 13 East, 155, *Rex v. Sudbury*, 1 B. & C 389, (8 E. C. L. R.,) and the recent case of *Rex v. The Mayor and Commonalty of York*, 6 A. & E. 419, (33 E. C. L. R.,)) that there was undoubtedly rateable property; and the only question was, whether there was a rateable occupation.

Thinking, therefore, as we do, that the first point is in favour of the appellants, we do not enter into the second, and upon that express no opinion.

The result is, that the order of sessions must be quashed.

S.

Order of sessions quashed.

FLETCHER against MARILLIER and Another.—p. 457.

In an action of trespass for breaking and entering the plaintiff's house and taking his goods, a special plea, justifying an entry to seize goods fraudulently removed by the defendant's tenant, should be confined to the breaking and entry; and the property in the goods should be traversed in a separate plea.

Quære, whether, in trespass *de bonis*, &c., a special plea, showing property in another, gives sufficient implied colour to the plaintiff, if it distinctly admits his possession?

TRESPASS for breaking and entering the dwelling-house of plaintiff, and continuing therein for a long space of time, and seizing divers goods and chattels of plaintiff then found and being in the said house.

Plea. As to breaking, entering, and continuing in the dwelling-house and seizing the said goods and chattels, that one J. Stent, for the space of one quarter of a year ending 25th December, 1836, and from thence until and at the said time when, &c., enjoyed a certain house, &c. situate, &c. as tenant thereof to defendant Marillier, by virtue of a certain demise by him to the said J. Stent, at the yearly rent of 18*l.* payable quarterly on, &c.: that on the said 25th December 4*l.* 10*s.* was due for a quarter's rent, and continued due until the said time when, &c. from J. Stent to Marillier; that the goods and chattels in the declaration mentioned, before the said time when, &c., and after the rent became due and payable from Stent to the defendant Marillier, to wit on, &c., they then being the property and in the possession of the said J. Stent, were wrongfully and fraudulently removed and taken by Stent from and out of the said house and premises so demised by Marillier to him with intent wrongfully to defraud Marillier of the said rent; and were then, with the privity and concert of plaintiff, placed and deposited by Stent in the dwelling-house in which, &c., against the form of the statute in such case made and provided; and thereupon Marillier, in his own right, and the other defendant as his bailiff, the said rent being in arrear and there being no sufficient distress upon the demised premises, within thirty days next after the said goods and chattels had been so fraudulently removed as aforesaid, entered into the dwelling-house in which, &c. (the outer door thereof being then open,) in order to seize and take the said goods and chattels, and did then and within the said thirty days seize and take

the said goods and chattels so there found as a distress for the said arrears of rent, &c.

Demurrer, assigning for causes, that defendants ought to have confined that part of their plea which related to the fraudulent removal of the goods to a justification of so much of the trespasses as related to the breaking and entering plaintiff's dwelling-house, and then to have traversed in a second plea that the goods were the plaintiff's, concluding to the country: that the part of the plea relating to the seizure of the goods of plaintiff found in the dwelling-house was argumentative in this,—that defendants, instead of simply traversing that the goods were the goods of the plaintiff, denied the same in a circuitous manner, by averring that they were then the property and in the possession of Stent: and that the plea, being bad in part, was bad altogether. Joinder.

The case was argued at the sittings in banc after Michaelmas term last, November 30th, 1838, before Lord DENMAN, C. J., PATTESON, WILLIAMS, and COLERIDGE, Js.

Bayley for the plaintiff. The plea is founded on stat. 11 G. 2, c. 19, s. 1, and the action is by a third party, not the owner of the goods. *Thornton v. Adams*, 5 M. & S. 38, decided that the statute applies only to goods which belonged to the tenant. Here the plea, though it alleges the goods to have belonged to the tenant when removed, does not show distinctly whether they were his property at the time of the seizure complained of. If the plea is to be considered as admitting property in the plaintiff, the justification fails, because the statute does not apply. If it shows property in the tenant, then it is an argumentative denial of the property as alleged in the declaration, which ought to have been directly traversed.

Martin, contra. The plea, though it states a property in the tenant, shows a *possession* of the goods by the plaintiff, which would be sufficient against a wrongdoer unless explained. (a) It does not indeed expressly state that the goods were, at the time of seizure, in the plaintiff's possession; but this sufficiently appears from the declaration, and is not denied by the plea. It is stated that the goods were placed in the plaintiff's house with her privity and consent. If the transfer of property from the tenant to the plaintiff was bona fide and for valuable consideration, so as to be within the exception of stat. 11 G. 2, c. 19, s. 2, the plaintiff should have replied it. If the defendant had traversed the plaintiff's property in the goods, the latter might have shown a bona fide sale, and so defeated the plea. *Nelson v. Cherrill*, 7 Bing. 663, (20 E. C. L. R.) shows that the plea need not be confined to the entry into the plaintiff's house.

Bayley, in reply. The plea should have given colour, so as to show an apparent cause of action by the plaintiff in respect of the goods. [*Martin*. The special causes of demurrer do not point to this objection.] It is stated that the plea is an argumentative, instead of a direct, denial of the property.

Cur. adv. vult.

LORD DENMAN, C. J., now delivered the judgment of the court.—The question in this case was, whether the special plea should not have been confined to the breaking and entering the house. We are of opinion that it should have been so confined, and that the addition, in the introductory part of the plea, of the "seizing and taking the said goods and

(a) See *Heath v. Milward*, 2 New Ca. 98, (29 E. C. L. R.); *Carnaby v. Welby*, 8 A. & E. p. 872, (35 E. C. L. R.)

'chattels,' coupled with the justification in the body of the plea, renders it bad. The justification asserts that the goods were the property of one Stent; that they had been fraudulently removed by him from a house which he held as tenant to defendant, in order to avoid a distress for rent in arrear, and that they had been placed in the plaintiff's house with her privy and consent against the form of the statute; and then goes on to justify entering the house in order to seize the goods, and the seizing them under the provisions of 11 G. 2, c. 19, s. 7. If by this plea it be meant to deny that the goods, at the time of the seizure, were the goods of the plaintiff, the denial is plainly indirect and argumentative, and the plea is bad for that reason, which is assigned as cause of demurrer. If, on the other hand, the plea be taken to admit the goods to have been, at the time of the seizure, the goods of the plaintiff, then the plea is bad in not bringing the case within 11 G. 2, c. 19. That statute authorises the landlord to follow goods only which belonged to the tenant at the time of removal, and not even those, if bona fide transferred to an innocent person for value, that is, in effect, goods which, at the removal, were, and at the time of seizure continued to be, the goods of the tenant. It is obviously inconsistent with the right to seize under the statute to admit that, at the time of the seizure, they were the goods of the plaintiff, not being the tenant. But it is said that the plea admits only the simple possession of the goods in the plaintiff, and goes on to show that such possession was wrongful, and that the property was in Stent, and so that the plea is consistent. The answer is that the plea does not admit the possession to be in the plaintiff. The introductory words do not; for they are the same words which would be used to introduce a direct traverse of the goods being the goods of the plaintiff, and cannot, therefore, involve an admission of their being in her possession. The words of justification in the body of the plea do not; for they merely state the goods to have been the property and in the possession of Stent, and to have been placed in the plaintiff's house (not in her possession) with her privy.

Under these circumstances we need not consider what would have been the effect of a positive averment that the goods were in the possession of the plaintiff. (a)

The uniform course of pleading under this statute, and also in cases of entering one man's house to seize the goods of another under a *fi. fa.*, has been to confine the plea to the trespasses in regard to the house. The case of *Nelson v. Cherrell*, 7 Bing. 663, (20 Eng. Com. Law Reps. 280;) was cited *contra*, and there is also a case of *Rich v. Woolley* in the same volume, 7 Bing. 651; (20 Eng. Com. Law Reps. 274.) In the former it may be well doubted whether the pleadings are accurately reported, and in the latter it rather seems as if the plea was so confined. However, in neither case was the point raised.

S.

Judgment for the plaintiff.

(a) Such a plea would resemble the plea of *liberum tenementum* in an action of trespass *quare clausum fregit*. See *Taylor and Fisher's case*, 3 Leon. 266; Cro. El. 246.

In the Matter of PALMER and the HUNGERFORD Market
Company.—p. 463.

P. held premises under an agreement for one year, and afterwards to quit on three months' notice at any quarter day. He was not to underlet or give up possession to another, or make any alteration, without consent of his landlord; and was to leave for his landlord's benefit all improvements or additions made during his occupation. He made certain improvements, and was afterwards ejected upon due notice to quit. Held that he was not entitled to compensation for such improvements under sect. 19 of the Hungerford Market Act 11 G. 4, c. lxx., although the notice to quit was given by reason of the passing of that act.

IN Hilary term, 1834, John Palmer, the tenant of a messuage called the Globe public-house, part of the Hungerford Market estate, had obtained a rule nisi for a mandamus to the Hungerford Market Company, commanding them to issue a warrant to the high bailiff of Westminster to summon a jury pursuant to stat. 11 G. 4, c. lxx., local and personal public (incorporating the said company,) for the purpose of assessing the damage and recompense to be given to him by way of compensation for improvements, tenant's fixtures, and otherwise in respect of the said messuage. By another subsequent rule, and by a judge's order in January, 1837, it was referred to a barrister "to look into the question," and dispose of the matters of the first-mentioned rule, and to award such compensation, if any, as he should think fit, with liberty to raise any points of law for the opinion of this Court if he should deem it necessary.

The arbitrator awarded that Palmer was not entitled to compensation for the improvements, and he set forth in his award the facts and circumstances on which the claim of compensation was grounded. The material facts are fully stated in the judgment of the Court. The compensation was claimed under sect. 19 of the above act, which provided that any person, tenant for years, from year to year, or at will, occupier of any part of the Hungerford House estate, who should or might sustain any loss, damage, or injury in respect of any interest whatsoever for good will, *improvements*, tenant's fixtures, or otherwise, which he then enjoyed, by reason of the passing of that act, should have and receive compensation from the company for such loss, &c.

The case was argued at the sittings in banc after Michaelmas term last,(a) by *Platt* for Palmer, and *Hayward* for the company; but as the authorities cited by them are sufficiently noticed in the judgment, the argument is omitted.

Lord DENMAN, C. J., in this term (January 12th) delivered the judgment of the Court.

This case arises upon a demand for compensation under the Hungerford Market Act, 11 G. 4, c. lxx., and the only question is, whether, under the circumstances hereinafter stated, Palmer, the applicant, is entitled to be compensated for improvements made by him during his occupation of premises, which the company have purchased and used for the purposes of the market. The occupation commenced under an agreement made December 28th, 1824, between Palmer and Wise, the then owner of the Hungerford Market estate, of which the premises were parcel, for one year commencing the 29th September preceding. The agreement contained the following stipulations—that if Palmer,

(a) November 30th, 1838. Before Lord Denman, C. J., Patteson, Williams, and Coleridge, Js.

with Wise's consent, should hold beyond the year, he should quit, or be at liberty to quit, at any (a) quarter day on receiving or giving three months' notice; that he should not underlet, or give up possession to any one, or make any alteration without the written consent of Wise. He was to keep all the glass entire, and so leave the same, together with all the articles mentioned in a schedule, and *all improvements or additions to the premises, which he should make during his occupation, for the benefit of Wise.*

On the 31st July, 1824, Wise had offered the Hungerford Market estate to Sir T. Tyrwhitt, on behalf of the intended market company; the offer was made on certain written terms, to which a decided answer was to be given in eight months. No answer was returned within that period, but, in December, 1830, the purchase was completed. Notice to quit at Michaelmas, 1830, was duly given by Wise on the 23d June preceding; (b) and Palmer finally gave up possession in April, 1831, after a verdict recovered in ejectment, wherein Wise and the Hungerford Market Company were several lessors of the plaintiff.

In 1826, Wise gave Palmer leave to extend his bar, and during his occupation, and before the passing of the Hungerford Market Act, (c) Palmer made certain other improvements. These were given up with the rest of the premises, and are valued at 44*l.* 10*s.*: the question now to be decided is, whether the company are bound to indemnify him for these improvements.

Upon the argument of this case, the several decisions which are reported upon the 17th and 19th sections of the act, were cited. These are *Ex parte Farlow*, 2 B. & Ad. 341, (22 E. C. L. R.,) *Ex parte Wright*, 2 B. & Ad. 348, (d) *Ex parte Davies*, 4 B. & Ad. 327, (24 E. C. L. R.,) *Ex parte Still*, 4 B. & Ad. 592, *Ex parte Gosling*, 4 B. & Ad. 596.

The principle upon which the court has proceeded in these cases in the construction of the act, is clear and satisfactory: it has been thought that the compensation clauses, the 17th and 19th, should be construed most liberally in favour of those who are to receive benefit from them, and most strongly against the company, who framed them; and it has further been considered, that the 19th clause must be extended to other than legal interests, which are provided for by the 17th. These principles, however, do not exclude an examination into the particular circumstances of each application; and where it has appeared that the party has in reality sustained no injury from the proceedings of the company, not merely in his legal or equitable interest, but not even according to any expectations which he may reasonably have entertained, the court has refused to interfere: therefore in *Ex parte Wright*, the party was held entitled to no compensation who held under Mr. Wise on an agreement for one year certain, with liberty to the landlord afterwards to determine the tenancy in any year at three months' notice,

(a) See note (c) to *Rez v. The Hungerford Market Company, Ex parte Gosling*, 4 B. & Ad. 600, (24 E. C. L. R.)

(b) The award found that the notice to quit was given, and that the premises were given up, "by reason of the passing of the act." It did not appear whether or not Palmer had notice of the treaty pending between Mr. Wise and the company for the sale of the estate at the time when he commenced his occupation, or when he made the improvements. See note (c) to *Ex parte Gosling*, 4 B. & Ad. 600, (24 E. C. L. R.)

(c) The act passed May 29th, 1830.

(d) And see 4 B. & Ad. 600, note (c).

and with a stipulation also that the tenant should not underlet, or give up possession of the premises, without leave in writing. Two other rules were discharged at the same time of parties applying under similar circumstances. This case is shortly reported, but it did not pass without consideration, coming on soon after *Ex parte Farlow*, when the act was fresh in the minds of the Court: and it has been treated as proceeding on a sound distinction in several cases that have followed. In one of these, *Ex parte Gosling*, the applicant had covenanted to yield up the premises *with all fixtures and improvements*; upon which, although he was allowed compensation for the loss sustained in respect of good-will, or the chance of a beneficial renewal of his lease, on the authority of *Ex parte Farlow*, he was held not entitled to any in respect of fixtures or improvements, though it was said the compensation jury might consider them so far as they added to the chance of a beneficial renewal.

In the present case they stand alone, and the applicant is in the same situation as Wright in respect of his general interest, and Gosling in respect of his improvements. It may fairly be collected that the peculiar stipulations which the agreement contains were introduced by Wise, with a view to completing his sale on more favourable terms for himself, by having an estate to dispose of, less incumbered with valuable interests in the tenants. He must be taken therefore to have received his compensation from the company in a higher price; and they will have to pay twice over for the same thing, if we were to hold the present applicant entitled. It is probable that in many cases where the facts left this matter doubtful, they have done so; but we think we ought not to proceed further than the line laid down in *Ex parte Farlow*; and as this is precisely within *Ex parte Wright*, and the distinction taken in *Ex parte Gosling*, and we think those cases rightly decided, the rule will be discharged.

S.

Rule discharged.

PACK, qui tam, &c., against TARPLEY, Clerk.—p. 468.

Where the qualification of a justice of the peace is an ecclesiastical benefice, a sequestration, issued at the suit of a creditor, under which possession has been duly taken, and the profits received, is an "incumbrance affecting the estate" within stat. 18 G. 2, c. 20, s. 1.

In a penal action against the incumbent for acting as a justice without being qualified, the writ of *sequestrari facias* is admissible in evidence against him, although the judgment roll contains no entry of an award of the writ.

Upon issuing such sequestration against a vicar, the bishop licensed him as a stipendiary curate, directed the sequestrator to pay him 120*l.* a year as such; and assigned to him the vicarage house and grounds as a residence, which were together worth above 100*l.* a year:

Held, 1. That the salary and the grounds, being enjoyed by assignment of the bishop, and not simply as vicar, were no qualification within the above statute: 2. That the vicar, being bound to reside notwithstanding sequestration, occupied the house by right as vicar, and not by the bishop's assignment, which *quoad hoc* was merely void; but that such house, unless proved to be alone worth 100*l.* a year, was no qualification.

DEBT upon stat. 18 G. 2, c. 20, for the penalty of 100*l.*, for acting as a justice of the peace without being duly qualified.

Plea. That at the time of so acting defendant had in law, to and for his own use and benefit, in possession, a freehold estate for life in lands, tenements, or hereditaments lying and being in that part of Great Britain called England, of the clear yearly value of 100*l.* over and above

what would satisfy and discharge the encumbrances that affected the same, and over and above all rents and charges payable out of or in respect of the same. Verification. The replication traversed the allegation in the plea. A verdict was taken subject to a special case.

On the trial it was proved that, at the time when defendant acted as a justice of the peace, the vicarage of Floore, in the county of Northampton, of which place defendant was vicar, was of the annual value of 500*l.*; but that on the 8th of April, 1834, a writ of sequestrari facias was issued out of the Court of King's Bench to the Bishop of Peterborough against defendant for levying the sum of 2270*l.* 0*s.* 6*d.* out of the vicarage. This writ purported to issue upon the return of the sheriff of Northamptonshire to a writ of fieri facias against the goods of defendant in a cause of *Watkins v. Tarpley*.(a)

An examined copy of the fieri facias, upon which the writ was issued, with the sheriff's return endorsed, was given in evidence. An examined copy of the judgment roll was also put in evidence, from which it appeared that there was no entry, upon the roll, of the sheriff's return or of the award of the writ of sequestrari facias, but merely an award of execution in the usual form. It being objected that, under these circumstances, the writ of sequestration could not be read in evidence, it was agreed that this objection should make part of the case.

Upon this writ the bishop issued a sequestration, which was published on 13th April, 1834, and possession of the vicarage under it was taken on the next day.(b)

(a) The writ of seq. fac. was in form similar to that given in Tidd's Practical Forms, p. 433, 6th ed.

(b) The form of the warrant under the writ was as follows:—"Herbert, by divine permission Bishop of Peterborough, to Thomas Scriven, of the town of Northampton, in the county of Northampton, Esquire, greeting. Whereas we have received a writ from our sovereign lord the King's Majesty, issuing out of the Court of King's Bench at Westminster, in the words following [*reciting the writ of seq. fac.*]; we, therefore, the bishop aforesaid, by virtue of his Majesty's writ before recited, and in obedience to the same, do decree all and singular the rents, tithes, oblations, obventions, fruits, issues, profits, and all other goods and emoluments whatsoever to the said vicarage and parish church of Floore, in the said county of Northampton, and within our said diocese, and all arrears of the same, to be sequestered, and by these presents do sequester the same, and also do constitute, appoint, and make you, the said Thomas Scriven, sequestrator of all and singular the rents, tithes, oblations, obventions, fruits, issues, profits, and all other goods and emoluments whatsoever to the said vicarage belonging or appertaining, and all arrears of the same; requiring and commanding you in his Majesty's name, that, immediately upon receipt hereof, you do sequester, take, collect, and receive into your hands, possession, and safe custody, all and singular the rents, tithes, oblations, obventions, fruits, issues, profits, and all other goods and emoluments whatsoever, to the said vicarage belonging or appertaining, in whose hands, possession or occupation soever they now are or hereafter shall be, forthwith on your receipt hereof; all which said rents, tithes, oblations, fruits, issues, profits, and all other goods and emoluments whatsoever to the said vicarage belonging or appertaining, you shall keep in safe custody, selling such parts of them as may be likely to perish or suffer damage to those who will give the most money for them, for and towards the payment of the said debt due to the said William Watkins. This service you shall see faithfully and effectually performed according to the tenor of his Majesty's writ and of these presents, from which you shall not in anywise desist until you have done all that lieth in your power to do and perform therein; provided always, that out of the rents, tithes, oblations, obventions, fruits, issues, profits, and all other goods and emoluments whatsoever belonging to the said vicarage, you shall pay or cause to be paid all dues which are of right issuing out of the said vicarage and incumbent upon the vicar thereof to pay by reason of the same, and all and every such sum or sums of money as shall be by us or our successors assigned or directed to be paid to any person or persons whomsoever for serving the cure of the said parish church; and also that you do repair, and keep and leave in good and substantial repair, the vicarage house and other premises belonging to the said vicarage; and also, when and so often as you shall be thereunto lawfully called and required, make a just and true account of what shall be received

The sequestrator proved that he had not applied any part of the profits of the living to this sequestration. Since taking possession he had received the rents and profits of the vicarage, not under the above writ and warrant of sequestration, but under a previous writ and warrant of sequestration against the ecclesiastical goods of defendant in another cause, which were not given in evidence. Defendant had performed the clerical duties of the vicarage since the sequestration, and had the sum of 120*l.* a year assigned to him by the bishop for so doing, out of the proceeds of the vicarage, which sum he received from the sequestrator accordingly. The bishop's license was in the usual form, and directed the sequestrator to pay defendant 120*l.* a year for serving the church as stipendiary curate, and assigned to defendant the vicarage house as a residence. Defendant continued to occupy the vicarage house and grounds, which were proved to be worth above 100*l.*(a) An actuary called by defendant gave the following evidence, which was objected to, and the objection made part of the case, viz.:—That the value of the defendant's life interest in the vicarage, estimating the living at 470*l.* per annum and the house at 100*l.* per annum, was 5425*l.*; excluding the house, 4638*l.* The surplus of the first estimate, after deducting the sequestration, was 3155*l.*; the surplus of the second, after the like deduction, was 2368*l.* For the lowest of these sums the defendant might purchase an annuity of more than 100*l.* a year for his life. It was proved that the sequestration poundage amounted, per annum, to 22*l.* 10*s.*, being at the rate of 5 per cent. on 450*l.*; that the repairs amounted, per annum, to 20*l.*; the land-tax to 15*l.* If these three sums, taking them as amounting to 50*l.*, were to be deducted, and also the stipend of 120*l.* per annum, from the sum of 470*l.*, (the annual value of the living exclusive of the house,) it would leave a surplus of 300*l.* per annum. The value of defendant's life interest in that annual surplus was 2960*l.*, which deducting the sequestration, would leave 690*l.*, a sum not sufficient to purchase an annuity of 100*l.* for defendant's life.

The case was argued at the sittings in banc after Michaelmas term last.(b)

Sir *W. W. Follett*, for the plaintiff. 1. The living is no sufficient qualification while it continues under sequestration and the sequestrator is in possession. The defendant has no estate "in possession" until the whole debt is levied.(c) In *Doe dem. Morgan v. Bluck*, 3 Camp. 447,

and paid by you in pursuance or by virtue of the power hereby committed to you, but subject nevertheless to, and without prejudice to, a certain other sequestration of the said vicarage decreed by us, and issued on or about the 10th day of this present month of April, to you the said Thomas Soriven, for levying a debt of 95*l.* 2*s.* 10*d.* due to Thomas Marsh. In witness whereof we have caused the seal of our vicar-general to be hereunto affixed. Dated," &c.

(a) In the judgment (post, p. 484,) it is taken for granted that the grounds, as well as the house, were assigned by the bishop. The special case stated, as above, the assignment of the house and the occupation of both. It is however not improbable that the license pursued the provisions of the Stipendiary Curates' Act, 57 G. 3, c. 99, s. 64, which enables the bishop to allot to the curate the house "with the offices, stables, gardens, and appurtenances thereto belonging." See also the late act, 1 & 2 Vict. c. 106, s. 93.

(b) November 27th, 1838. Before Lord Denman, C. J., Patteson, Williams, and Coleridge, Js.

(c) The following sections of stat. 18 G. 2, c. 20, were cited in argument. Sect. 1 enacts that no person shall be capable of being a justice of the peace, or of acting as such, for any county, &c., within England or Wales, "who shall not have, either in law or equity, to and for his own use and benefit, in possession, a freehold, copyhold, or customary estate, for life, or for some greater estate, or an estate for some long term of years,

it was held, that though a rector whose glebe was sequestered was entitled to a verdict in ejectment upon a demise laid before the sequestration took effect, he could not have an habere facias possessionem, because he was no longer entitled to possession; and that case is recognised in *Bennett v. Apperley*, 6 B. & C. 630, (13 E. C. L. R.) The sequestration is a continuing execution; the sequestrator must continue in possession until the debt is levied; and the bishop must return, not the writ, but the amount levied, from time to time; *Marsh v. Fawcett*, 2 H. Bl. 582. The defendant is a mere stranger, and has nothing but a salary assigned by the bishop, who is under no obligation to appoint him, and who may revoke his license at pleasure; 3 Burn's Eccles. Law, tit. *Sequestration*. The sequestrator is entitled to all the future profits, although not to the arrears of the living; *Waite v. Bishop*, 1 C. M. & R. 507, *Rez v. Armstrong*, 2 C. M. & R. 205. *Cottle v. Warrington*, 5 B. & Ad. 447, (27 E. C. L. R.), only shows that a judgment alone, without sequestration, is not an encumbrance within the Registry Act 5 G. 2, c. 6, so as to affect the benefice. As to the fact of the sequestrator not being shown to be in the actual receipt of the profits under the last writ, he was, at all events, entitled to enter and receive them; and if he did not do so, it was only because there was another and prior encumbrance. 2. This is an "encumbrance," or "charge payable out of or in respect of" the living. There are several cases on stat. 13 Eliz. c. 20, which show that a warrant of attorney given to the express intent that a sequestration may issue, is a charge within the meaning of that act; *Shaw v. Pritchard*, 10 B. & C. 241, (21 E. C. L. R.) *Flight v. Salter*, 1 B. & Ad. 673, (20 E. C. L. R.) In *Sharpe v. Thomas*, 6 Bing. 416, (19 E. C. L. R.), a warrant of attorney, given by an insolvent for the purpose of having judgment entered up and execution issued against his effects, was held to be a "charge" on his property within the meaning of 7 G. 4, c. 57, s. 32. 3. As to the points of evidence reserved in the case. It is immaterial to inquire whether an annuity of the requisite value could be bought for the value of the defendant's interest; the question is, whether he was in possession of a sufficient estate of freehold; if he was not, the value is unimportant. [Lord DENMAN, C. J. On this point we will hear the other side.] 4. The sequestration was properly in evidence. The record and the writs themselves were produced: an entry of the award of them is never made in practice, and it is not necessary to make it merely with a view to their admissibility in evidence. Entries of this kind on the roll,

determinable upon one or more life or lives, or for a certain term originally created for twenty-one years, or more, in lands, tenements, or hereditaments, lying or being in England or Wales, "of the clear yearly value of 100*l.*, over and above what will satisfy and discharge all encumbrances that affect the same, and over and above all rents and charges payable out of, or in respect of, the same; or who shall not be seized of, or entitled unto, in law or equity, to and for his own use and benefit, the immediate reversion or remainder of and in lands, tenements, or hereditaments, lying or being as aforesaid, which are leased for one, two, or three lives, or for any term of years, determinable upon the death of one, two, or three lives, upon reserved rents, and which are of the clear yearly value of 800*l.*," &c.

By sect. 6, where the lands, tenements, or hereditaments contained in the oath or notice, are, together with other lands, tenements, and hereditaments belonging to the person taking such oath, or delivering such notice, liable to any charges, rents, or encumbrances, it is enacted "that within the true intent and meaning, and for the purposes of this act, the lands," &c., "contained in the said oath or notice, shall be deemed and taken to be liable and chargeable, only so far as the other lands," &c., "so jointly charged, are not sufficient to pay, satisfy, or discharge the same"

when required, are permitted to be made at any time: *Taylor v. Gregory*, 2 B. & Ad. 257, (22 E. C. L. R.)

Waddington, contra. 1. The writ of sequestration was not admissible without showing that it issued by award of the Court. In *Ramsbottom v. Buckhurst*, 2 M. & S. 565, (28 E. C. L. R.) an examined copy of the judgment roll, with the award of an elegit, and return of the inquisition, was held to be the proper evidence of the elegit, and of the title of the tenant by elegit. DAMPIER, J., there says, that "a copy of the elegit and inquisition would not have been such good evidence." In *Doe dem. Bland v. Smith*, Holt, N. P. C. 589, it was held that where the execution creditor brings ejectment as assignee of the sheriff, it is not enough to produce the writ of *fi fa.*, without also showing the judgment. A writ only proves itself when the action is against an officer acting under it. Here too the case is stronger, for the objection is, not merely that the judgment was not produced, but that when produced, it was found deficient, and therefore proved that no writ was awarded. 2. Supposing the writ admissible, it was proved that the sequestrator had not in fact taken any thing under it, because, as it was alleged, there was another prior writ of which there was no legal evidence. Therefore the *prima facie* qualification proved by the defendant was not disproved by such clear evidence of a subsisting charge as ought to have been given in this penal action. 3. The principal question is, whether the defendant had, at the time of acting, a sufficient estate of freehold in possession, over and above all encumbrances or charges, within the statute. *Doe dem. Morgan v. Bluck*, 3 Camp. 447, only shows that ejectment will not lie; but that is not material, for one who has an unquestionable estate of freehold sufficient to qualify him, may nevertheless preclude his own entry by demise. The words "in possession," in sect. 1, are used in opposition to the words "in reversion or remainder" in the same section. Nor is the sequestration "a charge." The real character of a sequestrator is that of bailiff to the bishop, for the purpose of receiving the profits and paying the debt out of part of them. The history and nature of the writ, and the character and duties of the bishop and sequestrator, are stated very clearly in *Arbuckle v. Cowtan*, 3 B. & P. 321, and in *Hubbard v. Beckford*, 1 Hagg. Consist. Rep. 307, where it was held that the sequestrator was liable for dilapidations. In the former case Lord ALVANLEY observes that possession is not given under the writ. The incumbent is not displaced, but he and his family are to be suitably maintained by the sequestrator out of the profits, 3 Burn. Ecc. Law, tit. *Sequestration*, p. 341, 8th ed. Even if the whole profits were absorbed, it would not be a charge within the statute. The import of the word in other statutes has been under discussion in many cases. In *Moncaster v. Watson*, 3 Burr. 1375, where lands allotted under an enclosure act were made "subject to the same charges and encumbrances" as the other lands of the owners, to which they were allotted and consolidated, it was held that the allotments were not thereby made liable to certain church repairs, chargeable on the other lands; for that the words meant only encumbrances *on the estate*, as dower, &c. The word "charge" must be taken to refer to some liability imposed, either by the law or by a deed, on the estate itself, like a rent-charge or a jointure. If such is the interpretation in ordinary cases and in remedial acts, it ought, a fortiori, to be adopted where the statute is a penal one; *Hyde v. Cogan*, 2 Dougl. 699, *Bones v. Booth*, 2 W. Bl.

1226. Cases under stat. 13 Eliz. c. 20, have been cited to show that the sequestration is a charge. If it be so, then it is void by that act, and the benefice is unencumbered. But in none of the cases upon that act has a sequestration alone been considered as a charge. In *Colebrook v. Layton*, 4 B. & Ad. 578, (24 E. C. L. R.,) a warrant of attorney given with a view to a sequestration was held to be no charge, because it was not sufficiently connected with the deed by which an annuity had been charged on the benefice; and PATTESON, J., there says "it must appear that their intention of charging the benefice has in fact been accomplished; in other words, that the benefice is by the warrant of attorney so far actually charged, that the party to whom the warrant of attorney is given, following the authority which it confers, would, but for the provisions of the statute of Elizabeth, obtain an actual charge on the living. Now, whatever may have been the intention of the parties here, it is quite clear to my mind that they have not, by this warrant of attorney, charged the living." This case is recognised in *Saltmarshe v. Hewett*, 1 A. & E. 812, 820, (28 E. C. L. R.,) and in *Aberdeen v. Newland*, 4 Sim. 281, the Vice-Chancellor held a similar warrant of attorney, followed by judgment and sequestration, to be no charge within the statute, though given as an additional security for an annuity charged on the benefice. *Newland v. Watkin*, 9 Bing. 113, (23 E. C. L. R.,)(a) seems contrary, but the distinction is, that there the defeasance of the warrant expressly referred to the annuity granted out of the benefice. [Lord DENMAN, C. J. The cases were all cited in the late one of *Moore v. Ramsden*, 7 A. & E. 898, (34 E. C. L. R.,)] All these cases must be reconsidered if a mere sequestration is a charge. *Sharpe v. Thomas*, 6 Bing. 416, (19 E. C. L. R.,) was a case of liberal construction of a remedial statute, and went on the express ground of fraud. If there had been no fraud, the decision would have been different, and in favour of the present defendant, as appears from *Doe dem. Mitchinson v. Carter*, 8 T. R. 57, 300. 4. Supposing the sequestration valid and the sequestrator in possession, yet the incumbent has a right to reside in, and to occupy, the parsonage house and grounds; and these are found, in the present case, to be worth 100*l.* a year. Until deprived for misconduct he has an exclusive right to perform all the duties of his office, even as against the bishop: this right is admitted in the ecclesiastical courts, *Bliss v. Woods*, 3 Hagg. Eccl. Rep. 486, *Williams v. Brown*, 1 Curteis, Eccl. Rep. 53, and is recognised incidentally by this Court in *Farnworth v. Bishop of Chester*, 4 B. & C. 555, (10 E. C. L. R.,) He is bound to reside notwithstanding sequestration; *Doe dem. Rogers v. Mears*, Cowp. 129; and the residence must be in the parsonage house, *Law v. Ibbetson*, 5 Burr. 2722. Stat. 57 G. 3, c. 99, recognises throughout the same obligation. His residence, therefore, is not by appointment of the bishop, who has no right to convert him into a stipendiary curate, nor to give to the sequestrator any interest in the house. 5. The incumbent, having a right to officiate, is also entitled to receive the salary appointed to be paid by the sequestrator. It is not a mere stipend or pension voluntarily assigned to him by the bishop, but a vested right belonging to him in his character of vicar to which the sequestration is subsidiary and subject. [COLERIDGE, J. May not the bishop reduce it below 100*l.* at any time? and if so, is it not difficult to say that the defendant has a freehold worth 100*l.* per annum?] The

(a) See the judgment in 2 Mo. & Scott, 174, (17 E. C. L. R.)

question is, what was the value in the very year in which he was acting? Any freehold estate may happen to be of less than its average value in one year. In *Catcart v. Hardy*, 2 M. & S. 534, (17 E. C. L. R.,) "annual value" in stat. 43 G. 3, c. 84, was held to mean average annual value. It need not be the same value for life, for it is impossible to prove its value in future. He has an estate for life of which the value has been ascertained by the bishop. It is worth what it produces to him. He derives his right to receive it from the law, and not from the bishop, and he has received during the year past, as of right, 100*l.* and upwards out of his own estate. This is a sufficient qualification. The mere discharge of his debts is of value to him. The estate is not taken as on elegit, but the profits are put in a certain channel of payment for his benefit, *i. e.* for the payment of his creditors. In equity a trust to pay creditors is treated as a trust for the debtor himself; *Walwyn v. Coutts*, 3 Meriv. 707, *Garrard v. Lord Lauderdale*, 3 Sim. 1. 6. If the value for that one year be insufficient, then the average annual value, as calculated by the actuary independently of the stipend, is important. The evidence tendered proves that, calculating the whole value of the defendant's life-interest in his benefice, and deducting from it the whole amount of the sequestration, he is still possessed of an estate for life of the required value.

Sir *W. W. Follett*, in reply. As to proof of the sequestration, production of the roll was only necessary to show that there was a judgment. [PATTESON, J. *Ramsbottom v. Buckhurst*, 2 M. & S. 565, only shows that the roll, if it contained an award of the writ, would be sufficient evidence of the writ; not that the writ itself was not evidence. COLE-RIDGE, J. On proving the judgment and producing the writ, it is to be presumed that the latter issued in pursuance of the former.] It is not contended that the sequestration took any estate out of the defendant; but that it takes the profits out of him. His interest in them is gone upon the publication of the writ.(a) When the defendant is unable to bring ejectment by reason of the prior and paramount right of another, he cannot be said to be in possession. The bishop is in possession. The defendant may still have the freehold, but he has it not in possession; at all events, not in possession to his own use. The authorities cited show that sequestrators are bound to do repairs and other duties of the incumbent in consequence of their perception of the profits. Suppose a freeholder parts with all the rents of his estate, or suffers them all to be taken under an elegit, (as they now may be,) can he any longer vote for county members? [PATTESON, J. You may also put the case of a tenant for life who has leased for a term reserving no rent.] The cases on stat. 13 Eliz. c. 20, are in point. The incumbent, being forbidden to charge his benefice, is not permitted to do it indirectly by an instrument made with that object, and the warrant of attorney, though not itself a charge, is set aside as a fraud on the statute, because the intention is to put the benefice under sequestration. The sequestration is a charge, but is a void one only where it is, indirectly, the act of the incumbent himself. [PATTESON, J. It hardly follows that the construction of the two acts should be the same—a sequestration issued in invitum is not within stat. 13 Eliz. c. 20.] Where the words are the

(a) That a sequestrator has no interest or estate, see *Berwick v. Swanton*, cited Bunb. 192, note; *Attorney-General v. Mayor of Coventry*, 1 P. Wms. 307; *Walwyn v. Awberry*, 1 Mod. 258.

same, and are plain, there is no good ground for giving a different construction to a penal and a remedial statute; 2 Darris on Statutes, 737. A charge of this kind is exactly within the intent of stat. 18 G. 2, c. 20, which purports to provide against "persons of mean estate" acting as justices. Then as to the house and grounds which the defendant continues to occupy, it is not found that the former alone is worth 100*l.* per annum; and although it may be true that the sequestrator has no right to the house (for which, however, there is no authority), it is clear that he is entitled to the glebe and grounds. The defendant's possession of the latter can be merely by the license of the bishop. *Doe dem. Rogers v. Mears*, Cowp. 129, only shows that a sequestration is no excuse for non-residence. The salary of 120*l.* cannot be taken as the profits of the freehold. If the defendant chooses to assert his right to officiate as incumbent, and not as curate, the bishop is not bound to assign any salary at all. It is only as stipendiary curate that he receives the salary, which may be either reduced or assigned to a third party in place of the defendant, at the will of the bishop. To form a qualification it should be incident to the freehold, and not dependent on the will of the bishop. The cases cited of trusts for the benefit of creditors are inapplicable. *Cur. adv. vult.*

Lord DENMAN, C. J., in this term (January 24th) delivered the judgment of the Court.

This was an action brought upon the statute 18 G. 2, c. 20, for a penalty of 100*l.* against the defendant for acting as a justice of the peace without a proper qualification. By the 3d section of the act, the proof of qualification lies on the defendant; and that qualification is contained in the 1st section, which enacts: [His Lordship here read the section, see p. 472, note (b), ante.] The case finds that the defendant is incumbent of a vicarage of the annual value of 500*l.*; that a writ of sequestrari facias was issued against him on the 8th April, 1834, at the suit of one Watkins, for 2270*l.* 0*s.* 6*d.*; that the bishop issued a sequestration, which was published on the 13th April, 1834, and possession taken under it; that the sequestrator has ever since received the rents and profits of the vicarage, but has not applied them to this, but to a previous sequestration, which was not given in evidence; that the bishop, by his license, assigned to the defendant the vicarage house as a residence, and the sum of 120*l.* per annum for serving the church as stipendiary curate, which stipend the defendant has received, and has resided in the vicarage house before and since the sequestration, performing the duty; and that the vicarage house and grounds were worth above 100*l.* a year. It was objected, on the part of the defendant, that the writ of sequestrari facias was not admissible in evidence, because the judgment roll in *Watkins v. Tarpley* contained no entry of an award of the writ; but no authority was shown for the necessity of such entry, nor do we think it at all important.

Again, it was objected that nothing was applied by the sequestrator under this writ, and that it was not shown by any legal evidence how the profits of the vicarage were disposed of. The answer is, that the sequestrator is shown to have been in possession under the writ, and to have received the profits; whether he has disposed of them properly is immaterial to the present question. Much discussion took place as to the meaning of the words "in possession," in the first section of the act; whether they are used solely in contradistinction to the words "in

reversion or remainder" in the latter part of the clause, or have reference to the actual possession also: and the words "to his own use and benefit" were also much commented on. But as our decision turns upon the part of the clause relating to encumbrances and charges, it is not necessary to give any opinion on the other parts. The question is, whether it appears by the facts found, that the defendant has an estate for life of the clear yearly value of 100*l.* over and above what will satisfy and discharge all encumbrances that affect the same.

Now, whatever may be the true construction of the statute of 18 Eliz. c. 20, as to charges upon benefices, and whatever may be the proper rule to be established from the various cases decided under that act, we can have no hesitation in holding that a sequestration is an encumbrance that affects the defendant's estate for life in his vicarage within the meaning of the act of parliament. The clear yearly value of 100*l.* contemplated by the act, is plainly that which comes into the pocket of the owner of the estate as such, after all other demands upon it are satisfied; and we are to see whether, upon the facts stated, such clear yearly sum of 100*l.* does come into the defendant's pocket as vicar. The difficulty in the case arises from his continuing to reside and occupy the house and grounds which are found to be above the yearly value of 100*l.* If he be in the occupation of them by right as vicar, notwithstanding the sequestration, and could not be put out from them or compelled to pay any rent for them by any proceeding whatever, it is impossible to say that he has not an estate for life in them, or say that they are affected by the sequestration; and if not, their value is sufficient. Now, with respect to the house, it seems clear that the defendant is in the occupation as vicar, and that the assignment of it to him as a residence by the bishop is merely void, inasmuch as the incumbent is bound to reside notwithstanding any sequestration, and the bishop could not turn him out, nor change his character from that of vicar to that of stipendiary curate. But it is not found by the case that the house alone is of the yearly value of 100*l.*: and as the onus lies on the defendant, we cannot presume it to be so. The grounds and stipend must therefore be taken into consideration, and with respect to them the case is very different. The sequestrator might undoubtedly let the grounds as well as any other part of the glebe, and raise a profit towards the purposes of the writ; and though they are not so let, but assigned to the defendant by the bishop, (a) they, as well as the stipend of 120*l.* also assigned him by the bishop, are by no means enjoyed by him simply as vicar in his own right. The amount of the stipend seems to be in the discretion of the bishop, though probably that discretion would be exercised with reference to the salaries specified in the Stipendiary Curates' Acts, in which case the stipend could not be less in respect of the vicarage in question than 120*l.*; (b) and though the bishop cannot appoint any person to serve the church either instead of, or in addition to, the vicar, (c) and cannot by his license alter the vicar's character, and must assign to him the proper stipend out of the profits of the living, prior to any other payments, yet we are of opinion that the defendant, as regards the grounds and stipend, takes under the bishop, and not simply as vicar, and that his enjoyment of the grounds and stipend arises out of,

(a) See note, ante, p. 471.

(b) See the late stat. 57 G. 3, c. 99, s. 55, 56, repealed by stat. 1 & 2 Vict. c. 106.

(c) But see now stat. 1 & 2 Vict. c. 106, s. 99.

and is under, the sequestration ; so that it cannot be said in fact or in law that the defendant has an estate of the clear yearly value of 100*l.* over and above all encumbrances that affect the same. For these reasons we are of opinion that the defendant has failed to establish his qualification, and our judgment must be for the plaintiff.

S.

Judgment for the plaintiff.

The QUEEN against SPENCER.—p. 485.

The enactment 5 G. 2, c. 19, s. 2, that orders of justices shall not be removed by certiorari unless recognisance be given by the party removing, does not apply to writs of certiorari sued out by a prosecutor.

And therefore, where a conviction had been quashed by order of sessions, and the informer obtained a certiorari to remove such order, the Court refused to quash the writ on the ground that no recognisances had been given.

GEORGE RANGER was convicted by two justices in petty sessions, under a penal statute, on the information of Henry Spencer. The conviction was quashed by an order of quarter sessions, with costs to be paid by the convicting justices. Spencer obtained a certiorari to remove the order of sessions into this Court, but did not enter into the recognisances prescribed by stat. 5 G. 2, c. 20, s. 2; and on this ground

Barstow now moved that the writ of certiorari and the allowance thereof should be quashed. (a) The question is, whether a certiorari can be obtained by a subject to remove an order of justices, without entering into recognisances. The practice has not been to require them in the case of orders made against a prosecutor; and in *Rex v. Boulton*, 4 A. & E. 498, (31 E. C. L. R.,) it was held that a clause taking away certiorari did not bind the Crown, and consequently did not affect a prosecutor who, by the quashing of a conviction, had become defendant. But the present question has never been distinctly brought before the Court. The enactment itself is general, and provides that "no certiorari" shall be allowed without recognisance given by the party suing it out.

Lord DENMAN, C. J., after reading sect. 2 of stat. 5 G. 2, c. 19, said: The view of the Court has been that this section applied only where the defendant removed the order; and the practice has been grounded upon that. We ought not now to interfere with it.

LITLEDALE, WILLIAMS, and COLERIDGE, Js., concurred.

Rule refused.

(a) He stated that the motion had been made before Littledale, J., on summons, but dismissed, with leave to apply to the Court.

BOORMAN and Others against BROWN.—p. 487

Plaintiffs employed B., a broker, to sell goods for them, and to deliver such goods in the port of London, according to the contracts of sale. E., a lighterman, acted in the delivery of the goods, under B.'s direction, and was employed by the plaintiffs so to do, and was paid by them. Plaintiffs, through B., contracted with a purchaser for the sale to him of a parcel of goods, to be paid for on delivery. The goods were delivered without payment; and the price was, in consequence, lost. In an action by plaintiffs against B. for the breach of duty, they called E. to prove that, while he was waiting for B.'s orders as to the delivery, a person whom E. supposed to have proper authority, but who really had not, desired E. to carry them alongside a certain vessel, which he did without orders from B., and the goods were taken away, as on behalf of the purchaser; that E. informed B. of what had happened, and, upon hearing that B. had given no orders, said it was not too late to stop the goods, and he would do so; but that B. prevented him, and did not, himself, take proper measures to stop them:

Held, that E. was incompetent by reason of his liability to the plaintiffs as their servant.

CASE. The declaration stated that, before and at the time, &c., plaintiffs carried on the business of linseed crushers at Branbridges in Kent, and defendant was an oil broker in London: that plaintiffs retained and employed defendant, as such broker, to sell for them certain quantities, to wit thirty tons, of linseed oil, and to deliver the same in the port of London, according to the terms of the contract or contracts of sale, to the purchaser or purchasers, for reasonable commission and reward to defendant in that behalf; which retainer and employment defendant accepted, and, in pursuance thereof, and being duly authorised by plaintiffs and one Peacock in that behalf, made a contract between the plaintiffs and Peacock, whereby plaintiffs sold to him and he purchased of them the said thirty tons of linseed oil, at the price, &c., to be delivered in the river Thames, &c. (by successive parcels of ten tons each,) the amount of each parcel to be paid for from delivery in ready money: which contract the plaintiffs and Peacock respectively accepted: averment, that two of such parcels were consigned by plaintiffs to defendant, and delivered by him on payment, according to the contract: that, after the making of the contract, and in pursuance thereof, and of such retainer, &c., to wit on, &c., plaintiffs consigned to defendant as such broker at London aforesaid, by a barge or vessel called the Barham, ten other tons, &c., being the residue of the said thirty tons, &c., to be delivered by defendant to Peacock, on payment of the price by Peacock to defendant, and that the last-mentioned ten tons, being so consigned, afterwards, to wit on, &c., arrived in London on board the said vessel; of all which defendant had notice, and took upon himself the delivery of the last-mentioned ten tons according to the contract; and thereupon it became and was his duty, as such broker, to use all reasonable care and diligence that the ten tons should not be delivered to Peacock or any other person without the price being paid to defendant according to the terms of the contract: yet defendant, not regarding his said duty, but contriving, &c., did not nor would use reasonable care, &c. (following the words of the averment as to duty,) but wholly neglected and refused so to do, and so negligently and carelessly behaved in the premises that, by and through the mere carelessness, &c. of defendant, the last-mentioned ten tons, after the arrival thereof at London, to wit on, &c., were delivered to certain persons trading under the firm of John Hare and Co. at Bristol, without

the price or any part thereof being paid by Peacock or any other person to defendant. By reason whereof, and of Peacock having become bankrupt and being unable to pay, &c., plaintiffs have lost and been deprived of the oil and the price thereof.

Pleas. 1. Not Guilty. 2. That plaintiff did not consign to defendant, nor did defendant take upon himself the delivery of, the ten tons of oil, in manner and form, &c.: conclusion to the country. 3. That plaintiffs did not retain and employ defendant as such broker to sell and deliver the oil for commission, &c., nor did defendant accept such retainer, &c.: conclusion to the country. Issues thereon.

On the trial before Lord DENMAN, C. J., at the sittings in London after Hilary term, 1837, the plaintiffs proved a contract between them and Peacock for the sale to him of three parcels of oil, as stated in the declaration, to be respectively paid for on delivery; and that the third parcel, of ten tons, arrived in the Thames, consigned to the defendant, who was an oil and seed broker, and acted as such broker for the plaintiffs, to be delivered to Peacock in pursuance of the contract. To prove the circumstances of the delivery, they called Thomas Easton, from whose custody the oil was delivered. Easton, at the time in question, lived near the wharf at which the oil arrived, and was a lighterman and ledgerman. By the latter term is meant an inspector of corn and seed, and a person who attends to the delivery of such goods. The plaintiffs had for some time employed the witness to deliver goods for them according to the orders of the brokers; which he did, communicating such orders to the captains. He was paid by the plaintiffs. Sir *J. Campbell*, attorney-general, on behalf of the defendant, objected that the witness was inadmissible, because, if he had allowed the delivery without authority from Brown, he was liable for the costs of this action, and therefore he was interested in representing that Brown authorised the delivery. The objection was overruled. The witness proved that, on the arrival of the ten tons, he communicated it to the defendant, who would not at that time allow them to be landed; that, on a second interview, the defendant said he had not seen the parties, and that the witness must wait till two o'clock, when he should see or hear from defendant: that afterwards, on the same day, a person whom the witness had seen on Peacock's premises, and described as his man, came to the witness and ordered the oil to be taken alongside a vessel called the *Success*, which was done, and the oil delivered on board that vessel without payment; that, on the following day, the witness told the defendant of the oil having been shipped, whereupon the defendant said that he had given no orders; the witness then said it was not too late to stop the oil, and he would do so, but the defendant desired that he would not, and said he himself would see the parties on the subject. Some other facts were stated to show that the defendant had neglected to stop the goods, and had taken upon himself the responsibility of their being delivered. The witness also said that he himself had no means of knowing, nor was it his business to know, whether goods, of which he had the delivery, were paid for or not. Peacock did not pay, and became bankrupt. The Lord Chief Justice left it to the jury to say whether the defendant had caused the loss by his negligent conduct; and the plaintiff had a verdict. In the ensuing term, a rule nisi was obtained for a new trial, on the ground that Easton's evidence ought not to have been received. In Michaelmas term, 1838,

Cresswell and *Cleasby* showed cause. (a) Easton was competent. The plaintiffs employed Brown to give orders for the delivery of their goods, but not without payment; and Easton to effect the delivery under his orders. It was no part of Easton's business to see that the goods were paid for. If Brown failed in his duty by reason of Easton's neglect, and was thereby put in jeopardy, Easton was liable to him, but not to the plaintiffs. The question here being whether Brown had neglected his duty by delivering the goods unpaid for, if the plaintiffs succeeded upon that issue, Easton was not protected, for they had no ground of action against him if they failed: and, if Brown, having judgment against him in this action, sued Easton, the record, far from protecting Easton, would be evidence for Brown. Easton was called to prove, not merely a giving up of the goods without payment, but likewise that Brown might have stopped them afterwards, and did not. In reality, the act of Easton in shipping the oil did not constitute a delivery; that could only be perfected by Brown's assent, whenever given. Easton and Brown are not liable, as co-trespassers are, in respect of one and the same transaction; the duty was not the same, nor the neglect the same. This distinguishes the present case from *Morish v. Foote*, 8 Taunt. 454, (4 E. C. L. R.,) where, in an action for negligence in driving a mail-coach against the plaintiff's wagon-horse, the wagoner was held incompetent for the plaintiff by reason of his liability to his own master. The correctness of that decision may be questioned. In *Green v. The New River Company*, 4 T. R. 589, which was there cited for the defendant, the witness rejected was the defendant's servant: a verdict against the employers would have been evidence, as measuring the damages in an action brought by them against the servant; but a verdict for the defendant in a similar case would prove nothing in an action by the plaintiff against his servant. (b) It is sufficient, however, to say that in *Morish v. Foote* the breach of duty complained of in the master was the same which he might afterwards have charged upon the servant; here the failure on Brown's part was delivering the goods without payment; but Easton had nothing to do with the payment, and was merely to deliver according to Brown's directions. [PATTESON, J. Suppose he acted without any order from Brown.] Then the recovery in this case would not protect him from an action at the suit of the plaintiffs: both parties might be liable: Easton for shipping the goods on board the *Success* without orders, and Brown for assenting to that shipment as a delivery. There is, in truth, no ground for saying that the plaintiffs could maintain any action against Easton, or, at all events, that they could recover more than nominal damages; but, if he were liable to these, he is not on that account interested in procuring a verdict against Brown. The case, therefore, differs from all those in which the witness has been held incompetent because the result of the trial would convict or acquit himself of misconduct. The interest which disqualifies a witness must be present and certain, not uncertain or contingent; 1 Stark. on Ev. 103, (2d ed.). In *Cuthbert v. Gostling*, 3 Camp. 515, where the action was for injury done to the plaintiff's wall in repairing the defendant's own house, the defendant proposed to call the workmen whom he had employed; they were objected to on the ground that, if they had been guilty of excess and the plaintiff recovered, they would be liable over

(a) November 21st. Before Lord Denman, C. J., Patteson, Williams, and Coleridge, J.

(b) See 1 Phill. on Ev. 95—102, part 1, c. 7, 8th ed.

to the defendant; but Lord ELLENBOROUGH overruled the objection, saying, "it by no means followed that they would be liable to the defendant, if the plaintiff had a verdict; nor did it appear that they were at all interested in the event of the suit." So here, when the defendant argues that, if he is not liable, Easton is, that ought distinctly to appear: but the facts do not show it; for, if Easton acted under the influence of fraud or excusable mistake, he is not even *prima facie* liable. And, supposing that he has been guilty of misconduct, he is answerable to one or other of the present parties, whether this action succeeds or fails.

Sir *J. Campbell*, Attorney-General, and *Butt*, contra. There was no privity between Easton and Brown. Brown's duty was, as broker, to receive the price of the goods, and not order the delivery of them without payment; Easton's duty, to superintend the delivery and give directions to the captain, but not to deliver the goods without order from Brown. Easton, then, was servant to the plaintiffs, and liable to them only. The object of his evidence was to prove a *prima facie* negligence in himself, but to redeem the consequences of it by showing that, after he had delivered the oil without Brown's order, Brown might have stopped it but would not. The rule excluding testimony of a servant or agent in cases of this kind is supported not only by *Morish v. Foote*, but by a long train of other authorities: *Martyn v. Hendrickson*, 1 Salk. 287, S. C. 2 Ld. Ray. 1007, *De Symonds v. De La Cour*, 2 New Rep. 374, *Protheroe v. Elton*,^(a) *Miller v. Falconer*, 1 Camp. 251. [PATTESON, J. In that case Lord ELLENBOROUGH seems to assume that either the defendant or the witness must have been in fault; but I think that is not a necessary assumption. COLERIDGE, J. It may be that neither was in fault. Lord DENMAN, C. J. I think we must take it for granted, in that and similar cases, that the opening was such as to raise that inference.] Here a distinct imputation of negligence lay upon Easton, and he sought to throw the responsibility upon Brown. *Kerriason v. Coatsworth*, 1 Car. & P. 645, (12 E. C. L. R.,) *Whitamore v. Waterhouse*, 4 Car. & P. 383, (19 E. C. L. R.,) *Sherman v. Barnes*, 1 M. & Rob. 69, and *Wake v. Lock*, 5 Car. & P. 454, (24 E. C. L. R.,) are further authorities for the rule now relied upon. [PATTESON, J. It is said, in *Miller v. Falconer*, 1 Camp. 251, that the witness "comes to discharge himself." I have a difficulty in seeing how, in the present case, the witness could avail himself of the verdict if the plaintiffs afterwards brought an action against him. WILLIAMS, J. If the plaintiffs had failed in this action, how would the record have been available against Easton?] First, though the success of the plaintiffs in this cause would not be a complete discharge to Easton, yet, if they recovered damages against Brown, Easton would be relieved to that extent. He would therefore derive a material advantage from the result of his evidence. The expression in some of the cases, that the witness comes to "discharge" himself, is loose; but any interest, whatever be its amount, disqualifies. Secondly, the verdict here, if the plaintiffs had failed, might have been evidence against Easton. They might have brought an action against him, alleging that, in consequence of his representation as to Brown's negligence, they sued Brown and failed. [PATTESON, J. Is there any instance of such an allegation of special damage? The argument would apply to almost every witness whose

(a) Cited in *Morish v. Foote*, 8 Taunt. 457. Reported, as *Rotheroe v. Elton*, 1 Peake's N. P. C. 117, 3d ed.

evidence is relied upon by a plaintiff.] The supposition here is, that the witness had himself been guilty of misconduct in the transaction; then the allegation would be that, a loss having been occasioned by his negligence, he represented to the plaintiffs that it was owing to misconduct in Brown, upon which representation they brought an action against Brown, and failed. The distinction between witnesses for a plaintiff and for a defendant was taken in *Morish v. Foote*; but BURROUGH, J., said, "it would introduce an extreme anomaly in the law if it made any difference in cases of this nature, whether a witness was called on one side or on the other." The argument here, that the witness was liable to an action at the suit of Brown, and therefore stood indifferent, cannot prevail. [Lord DENMAN, C. J. We do not think that argument entitled to any weight.]

Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the court.

This was an action against the defendant, a broker, for negligently delivering a certain quantity of oil of the plaintiffs without payment; the declaration stating that the same had been consigned to the defendant to be delivered to one Peacock upon payment, and that the defendant delivered it to J. Hare and Co., without such payment. Upon the trial before me at Guildhall at the sittings after Hilary term 1837, Thomas Easton was called as a witness for the plaintiffs; and the object of so calling him was to prove that the delivery of the oil had been directed by himself under the orders of the defendant. The witness described himself as being a lighterman and ledgerman; that he had been employed by the plaintiffs about five years; and that the nature of his employment was to attend the brokers for their orders and to hand them over to the captains. It subsequently appeared that the witness earned 50*l.* or 60*l.* a year from the plaintiffs by this employment. To the competency of this witness objection was made upon the ground that he was directly interested in the event of the suit, and in fixing the liability upon the defendant. And the question seems to be reduced to this single point, whether the witness, by the share which he came to avow himself to have had in the transaction, *did* render himself liable to the plaintiffs; because, *if* he did, it seems impossible to distinguish (favourably for the plaintiffs at least) the present from those cases on which reliance was chiefly placed in support of the objection, and to which we shall presently advert.

Now, certainly, the oil whilst it remained on board the *Barham*, by which vessel it was consigned (according to the plaintiffs' case) to the defendant's care, was in a state of security. The mischief and loss arose from its being transhipped to another vessel which conveyed it away to Bristol, by which the damage was alleged to have been sustained. And, if that act had been done by the witness without any authority from the plaintiffs, and injury was thereby incurred, he (the witness) surely would have been responsible. Such liability, therefore, having attached upon the witness according to the earlier part of his testimony, it comes next to be considered, whether his position can be distinguished from that of a servant, called for the plaintiff his master in an action brought by the latter for some alleged negligence in the defendant, whereby the plaintiff's carriage or vessel (whatever the case may be) sustained damage. And we cannot see how the interest of this witness can be *less* to shift

his own prima facie liability upon the defendant, by proving orders given by the latter to him to do the thing, than that of the servant (in the cases alluded to) to clear himself of all responsibility to his master, by showing his own conduct in the transaction to have been wholly blameless, and the fault or negligence to have been wholly on the side of the defendant or those representing him when the mischief took place. The responsibility in the present case seems to be quite as probable and imminent as in those; and in those cases we consider the rule now to be too well settled to admit of doubt or question.

Thus in the case of *Miller v. Falconer*, 1 Camp. 251, which was an action against the defendant for negligently running against the plaintiff's cart with a dray, the servant of the latter who was driving the cart was held to be incompetent by Lord ELLENBOROUGH without a release. The like is reported by GIBBS, C. J., in the case of *Morish v. Foote*, 8 Taunt. 457, (4 Eng. Com. Law Reps. 164;) S. C. (as *Rotheroe v. Elton*,) Peake's N. P. C. 117, 3d ed., to have been ruled by Lord KENYON as to a shipowner; where, in an action on a policy on goods on board that ship, he was called to prove her seaworthy, the defence being that she was not. And in the case just mentioned, of *Morish v. Foote*, a case precisely the same in its circumstances again occurred; and the Court of Common Pleas upon full argument held the plaintiff's servant incompetent without a release.

It has been urged that there is a marked distinction in actions of this description between the case of a plaintiff and a defendant: that in the latter instance the servant is necessarily called to *rebut* the charge of negligence, which is to render him liable to his employer; for that, unless *some* case had been made against the defendant, his (the servant's) testimony would not be required: whereas in the former it stands at least indifferent, whether any suggestion of negligence will be made against the servant or not; and indeed in the *then* state of things, when the objection is made, the presumption is rather the other way. Whether, if this had been *res integra*, this distinction might have been considered of any importance, it is unnecessary now to inquire, for it was pressed upon the notice of the Court of Common Pleas in the case (already referred to) of *Morish v. Foote*, without affecting the conclusion at which they arrived.

Being of opinion, therefore, that the law is settled by those cases, and that the objection of interest in the present instance is *at least* as strong (and we need not go further,) we think the witness was incompetent, and that there must be a new trial.

Rule absolute.

BURROUGHS against HODGSON.—p. 499.

Where defendant in an action of debt pleads, 1. As to all but a parcel of the sum claimed, that he never was indebted: 2. As to such parcel, that defendant was indebted in no more, and that the same was recoverable in a court of requests having exclusive jurisdiction, *Semble*, that such second plea may commence as an answer to part only of the declaration, and need not be pleaded to the whole!

Where such court of requests has exclusive jurisdiction of debts up to a certain amount, the plea must state in terms that defendant was not indebted beyond that amount. It is not sufficient to allege that he was not indebted in beyond a smaller sum, which is specified:

For a plea must be shaped so that the averments, if traversed, will be material and conclusive whether found for plaintiff or defendant; and this averment would not be so, if found for the plaintiff.

DEBT. The declaration claimed 6*l.* for goods sold and delivered, and 6*l.* as due on an account stated: damages 6*l.* Pleas. 1 (a) The defendant, "as to the several monies in which the defendant is in the declaration mentioned to have been indebted to the plaintiff, except as to 1*l.* 13*s.* 8*d.* parcel of the said monies, says that he never was indebted, except as to the said sum of 1*l.* 13*s.* 8*d.*, in manner and form," &c.; and of this, &c. (conclusion to the country.) 2. And, as to the said 1*l.* 13*s.* 8*d.*, parcel as aforesaid, the defendant, &c., (actionem non,) "because he says that the 10th day of October next (after the making and passing a certain act of parliament made," &c., (stat. 6 & 7 W. 4, c. xxxvii., local and personal, public,) "entitled, 'An act to repeal two acts of the reign of King George II. for the recovery of small debts within the city and liberty of Westminster, and for granting more effectual power for that purpose,' (b) elapsed before the commencement of this suit: and the defendant further says that, at the time of the commencement of this suit, he the defendant was not indebted to the plaintiff to a greater amount than the said sum of 1*l.* 13*s.* 8*d.*" (Then followed the proper averments to bring the debt within the jurisdiction of the Westminster Court of Requests mentioned in the act.) "And the defendant further says that, before and at the time of the commencement of this suit, the said debt of 1*l.* 13*s.* 8*d.*, being a debt not exceeding 40*s.*, was recoverable by the plaintiff against and from the defendant in the said Court of Requests by virtue of the first mentioned act; and that the plaintiff brought this action as to the said sum of 1*l.* 13*s.* 8*d.* in this honourable Court contrary to the form of the same act." Verification, and prayer of judgment if plaintiff ought to have or maintain his action as to the 1*l.* 13*s.* 8*d.*

Replication joining issue on the first plea. Demurrer to the second plea, assigning causes which will sufficiently appear by the argument. The demurrer was argued in last Michaelmas term. (c)

(a) The second plea only was set out in the paper books; but the Court desired to see the first also, before giving judgment: and Patteson, J., observed that, where a plea demurred to contained a reference to something partly answered in another plea, the rule Hil. 8 & 9 G. 4. 7 B. & C. 642, did not prevent the insertion of such other plea in the demurrer-book.

(b) Sect. 1 repeals the former acts from and after the 10th October, 1836.

Sect. 37 empowers the commissioners under this act to decide all disputes and differences between party and party for any sum not exceeding 5*l.*, in all actions or causes of debt except as after (in sect. 38) mentioned.

Sect. 86 enacts that no action for any debt not exceeding 40*s.*, and recoverable by this act in the said court of requests, shall be brought against any person residing within the jurisdiction, in any other court; but the clause preserves the jurisdiction of his Majesty's courts of record at Westminster or other courts in cases where the debt shall exceed 40*s.*

(c) November 13th. Before Lord Denman, C. J., Patteson, Williams, and Coleridge, J.

W. H. Watson for the plaintiff. First: the plea is demurrable, because it begins as an answer to part of the declaration, but in fact answers the whole: *Gray v. Pindar*, 2 B. & P. 427. See notes (3) and (g) to *Earl of Manchester v. Vale*, 1 Wms. Saund. 28. Secondly, The plea ought to have been (to the whole declaration) that the debt did not exceed 40s. The precedents are so. Here the allegation is, as to 1*l.* 13s. 8*d.*, that the defendant was not indebted to the plaintiff in a greater amount than that sum: to reply that he was, would have been tendering an immaterial issue; and it was not incumbent on the plaintiff to reply that the debt exceeded 40s., when the defendant had not specifically alleged the contrary.

E. V. Williams, contrà. There are two pleas, which, together, constitute one entire answer to the declaration. The defence could not have been pleaded otherwise. Had the defendant professed to answer the declaration in a single plea, he must have concluded with a verification, and yet in the body of the plea he must have denied a positive averment in the declaration, namely, that the debt was of a greater amount than 1*l.* 13s. 8*d.* He could not pass over that averment and plead that a debt alleged to be 6*l.* was only 1*l.* 13s. 8*d.* In *Gardner v. Jessop*, 2 Wils. 42, pleas like the present were pleaded, and not objected to. In *Gray v. Pindar*, which was an action of assumpsit on a note payable by instalments, the defendant pleaded, as to the several causes of action in the declaration mentioned except as to one instalment, that the *said several causes of action in the said declaration mentioned* did not, nor did any of them, accrue within six years, &c.; and the plea was demurred to as inconsistent, because it admitted one instalment to be due, and yet professed to bar the plaintiff as to all the causes of action stated in the declaration. That plea, no doubt, was erroneous, because the action lay for each separate instalment; but here the pleading is different. The defendant first states, as his defence in substance is, that he owed no more than 1*l.* 13s. 8*d.*; and he then, as to that sum, pleads the Court of Requests Act. If the second plea not only gives an answer as to the 1*l.* 13s. 8*d.* but would also bar the whole action, that is no vice in the pleading. The case is analogous to that in which a defendant pleaded that, since the cause of action accrued, the plaintiff took a husband, and he released to the defendant, *Dame Audley's Case*, Moore, 25: there the coverture would have been a complete answer, but the plea was held not to be double. The plaintiff here might have taken a material issue by averring that the debt exceeded 40s. A defendant is not obliged to plead so that issue may be taken by following the very words of the plea. Denying that the defendant owed more than 1*l.* 13s. 8*d.*, is denying, a fortiori, that the debt exceeded 40s.

W. H. Watson in reply. In *Gardner v. Jessop*, 2 Wils. 42, there was a plea of non assumpsit except as to 1*l.* 13s. 8*d.*; and, as to that sum, the defendant, in a second plea, pleaded the Middlesex County Court Act. Here the second plea professes to give an answer as to part only of the debt, but proceeds to aver that the defendant was not indebted in more than 1*l.* 13s. 8*d.*, and then alleges the statute.

Cur. adv. vult

Lord DENMAN, C. J., now delivered the judgment of the Court.

This was an action of debt for goods sold and delivered. The defendant pleaded as to all but 1*l.* 13s. 8*d.* that he never was indebted,

and, as to that sum, stat. 7 W. 4, c. cxxxvii., commonly called the Westminster Court of Requests Act. This part of the plea contained, amongst other averments, the following: "And the defendant further says that, at the time of the commencement of this suit, he the defendant was not indebted to the plaintiff to a greater amount than the said sum of 1*l.* 13*s.* 8*d.*" The defendant demurred; and upon the argument two grounds of demurrer were insisted on. First, That the plea begins as an answer to part, but is in truth an answer to the whole of the declaration. Secondly, That no material issue can be taken on the averment above set forth, inasmuch as, though the defendant should be found indebted in a greater amount than 1*l.* 13*s.* 8*d.*, yet if the amount were under forty shillings the case would be equally within the Court of Requests Act, and therefore the averment, in order to be traversable, ought to have been "that the defendant was not indebted to the amount of forty shillings."

With respect to the first objection, it appears, upon an examination of the precedents, that it has been usual to plead such a plea to the whole declaration. The form usually adopted is in truth a denial of part, and a confession and avoidance of the residue of the declaration, yet not severing the parts in the introduction of the plea. On the present record, the parts are severed in the introduction to the plea; for the answer of "never indebted" to part, and of the Court of Requests Act to the residue, together, form but one plea to the whole declaration; and, in this respect, the plea is more in conformity with the ordinary rules of pleading than that which is usually adopted. There is nothing inconsistent in the statement in the introduction, that the 1*l.* 13*s.* 8*d.* is parcel of "the several monies in which the defendant is in the declaration *mentioned* to have been indebted to the plaintiff," with a denial that he was in truth indebted in any further sum; and the peculiar nature of the defence given by the Court of Requests Act makes it almost impossible to shape that defence according to the strict rules of pleading.

But we are not obliged to determine this point; for upon the second objection we are of opinion that judgment must be given for the plaintiff. If any averment at all as to the amount of the debt be necessary the form commonly used is clearly the correct and proper one; namely, that the defendant was not indebted to the plaintiff "in any sums of money amounting to forty shillings," or "to the amount of forty shillings." On such an averment a material issue might be taken; and, though it is true that, if the present averment be traversed and found for the defendant, it would be material and conclusive, yet if found for the plaintiff it would be otherwise. The plaintiff, however, is entitled to have the plea of the defendant so framed as that the averments in it, if traversed, will be material and conclusive whichever way they be found; and their not being so framed is a good ground of demurrer. If, indeed, the averment was immaterial and might be struck out altogether, the plaintiff would have no ground to complain. But it is clear that the defendant must show in some way upon the face of his plea that the cause of action is under forty shillings; otherwise the jurisdiction of this Court is not taken away by the Court of Requests Act. The averment, therefore, cannot be said to be immaterial, and cannot be struck out. In the case of *Gardner v. Jessop*, 2 Wils. 42, the plea contained no such averment, and was in other respects similar to the

present plea; but that case turned upon the replication, which raised an entirely different point; and the form of the plea was not discussed. Judgment for the plaintiff.

WOLLEN against SMITH.—p. 505.

Where a defendant pleads *puis darrein continuance*, the plaintiff may always discontinue without payment of costs.

Therefore, where defendant (after plea) pleaded his bankruptcy and certificate *puis darrein continuance*, and plaintiff thereupon took out a summons for leave to discontinue without costs, it was held that he was entitled so to do, and that defendant could not be allowed to sign judgment of *non pros* for want of a declaration. Stat. 6 G. 4, c. 16, s. 59, is not applicable where a certificate in bankruptcy is pleaded *puis darrein continuance*.

E. James had obtained a rule in Michaelmas term, 1837, calling upon the plaintiff to show cause why the summons taken out in this cause on 1st April, 1838, should not be discharged, and why the defendant should not be at liberty forthwith to sign judgment for want of a replication.

In the last term (8th November, 1838, (a)) *Humfrey* showed cause, and *E. James* was heard in support of the rule. The circumstances of the case, and the arguments and authorities adduced, will fully appear from the judgment.

Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the Court.

This was an action by the indorsee against the acceptor of a bill of exchange. The defendant became bankrupt, and a fiat issued against him on the 6th July, 1836. He was arrested in this action in the month of November in the same year. The plaintiff declared in February, 1837; and the defendant pleaded in the same month, that he did not accept. After pleading, he obtained his certificate; and, on the 27th March, pleaded it *puis darrein continuance*. He then ruled the plaintiff to reply, who took out a summons for leave to discontinue without costs. The learned Judge, before whom it was heard, referred the parties to the Court; and, accordingly, the defendant obtained a rule nisi to discharge the summons, and to be at liberty to sign judgment of *non pros* for want of a replication; which was argued in last Michaelmas term.

On the part of the defendant, the case was said to be similar to those of *Thompson v. Percival*, 5 B. & Ad. 925, 935, (27 E. C. L. R. 241;) and *Augarde v. Thompson*, 2 M. & W. 617, in which it was held that a plaintiff cannot avail himself of sect. 59 of stat. 6 G. 4, c. 16, so as to discontinue without costs, unless he has proved under the fiat, or at least procured a claim to be entered. The case of *Harris v. James*, 9 East, 82, was also referred to; in which a defendant, who obtained his certificate after declaration, but before plea, was held to be entitled to plead it in bar, and to have the costs of the action, as he would on any other successful plea in bar.

On the part of the plaintiff it was urged that this case differs entirely from those cited; inasmuch as it arises upon a plea *puis darrein continuance*, and is wholly independent of sect. 59 of stat. 6 G. 4, c. 16: that every plea *puis darrein continuance* confesses that the action is rightly brought and maintained up to the time of that plea; for the form of the plea is, that the plaintiff ought not *further* to maintain his

(a) Before Lord Denman, C. J., Patteson, Williams, and Coleridge, Js.

action : that the plaintiff is in no case compellable to go on with his action after such a plea, but may admit the truth of the defence which has arisen, and abandon his action without being liable to costs. In support of this position, the case of *Baker v. Morrey*, 1 Moore & Payne, 138, (17 E. C. L. R. 168,) was cited; in which the Court of Common Pleas stayed the proceedings on a judgment of *non pros* signed under similar circumstances to the present, without costs. *Lytleton v. Cross*, 4 B. & C. 117, (10 E. C. L. R. 285,) was also referred to for the same general doctrine: and *Lindo v. Simpson*, 2 Smith's Rep. 659, might have been added.

We are of opinion that these cases fully support the plaintiff's argument: and, without at all impeaching the authority of *Thompson v. Percival*, and *Augarde v. Thompson*, in both which cases the motions were professedly grounded on sect. 59 of stat. 6 G. 4, c. 16, and the only question was, whether the requisites of that section had been complied with, we hold that, after pleading *puis darrein continuance*, the defendant cannot force the plaintiff on, but the latter is entitled to discontinue his action without costs.

The present rule must therefore be discharged, but without costs: and the plaintiff has liberty to discontinue without costs.

The same rule must be pronounced in the case of *Horncastle v. Smith*; and in the case of *Price v. Morgan*, in which the same point arose in a different form, the rule must be made absolute.

Ordered accordingly.

PALMER against TEMPLE.—p. 508.

Where A. agrees to demise a house to B. for a term, in consideration of 300*l.* then paid "by way of deposit, and in part of 5500*l.*," the whole purchase money, possession to be delivered and accepted on a day named, and B. agrees to accept such demise, but, on the day, refuses to accept, and A. afterwards disposes of the house to a third party, *Quære*, whether, in the absence of any provision that the deposit shall be forfeited, or of any clause in the agreement, except as above, showing the intention of the parties in this respect, B. can recover the deposit from A.?

The intention may be collected from other parts of the agreement.

Thus, where there was a distinct clause providing that either party making default should forfeit 1000*l.*, it was held that the deposit was not to be forfeited, and might be recovered back on A.'s disposing of the house as above.

But that it could not be recovered back before A. disposed of the house.

Under the above circumstances, an action brought for the deposit after the day named in the agreement, but before A. had disposed of the house, having failed, was held no estoppel to an action brought after A. had disposed of the house. And it was held that the facts negatived a plea that the causes of the two actions were identical.

ASSUMPSIT for 300*l.* had and received, 300*l.*, interest, and 300*l.* on an account stated.

Pleas. 1. Non assumpsit. Issue thereon.

2. That plaintiff ought not to be admitted to say that defendant was indebted to plaintiff in the said sum of 300*l.*, or any part thereof, for money received by defendant for the use of plaintiff, or that defendant promised to pay the last-mentioned sum or any part thereof to plaintiff, because he saith that, before the commencement of this suit, viz. 2d July, 1835, &c.: The plea then stated an action brought in K. B. by plaintiff against defendant on promises; declaration therein, 12th No-

vember, 1835, for that defendant on 1st October, 1835 was indebted to plaintiff in 1000*l.* for money had and received by defendant for the use of plaintiff: plea by defendant in the said former suit, that he did not promise, &c.: issue: trial of the said issue on 15th December, 1835, at Guildhall, London, before Lord DENMAN, C. J., &c.; and finding by the jury that defendant did not promise in manner, &c.; whereupon, afterwards and before the commencement of this suit, viz. 19th February, 1836, it was considered, in and by the said Court, in the said former action, that plaintiff should take nothing by his said writ, but that he should be in mercy, &c., and that defendant should go thereof without day, &c., as by the record, &c.: which said judgment still remains in full force, &c. Averment that the 300*l.*, in the first count of the declaration in this action above mentioned, was and is part and parcel of the said 1000*l.* mentioned in the declaration in the said former suit; and that the said supposed promise in the said first count mentioned, and the supposed promise in the said declaration in the said former suit mentioned, as to the said 300*l.*, parcel of the 1000*l.* mentioned in the said last mentioned declaration, are one and the same. &c.; and that defendant did not promise in respect of the sum of money in the said first count of the declaration in this action above mentioned, otherwise than as was alleged in the declaration in the said former action as to the said sum of 300*l.*, parcel, &c.: and the said supposed cause of action in the first count of the declaration in this action mentioned, and the said supposed cause of action in respect whereof the plaintiff declared against the defendant in the said former action, as to the said 300*l.* parcel, &c., are the same identical supposed cause of action, &c. Verification, and prayer of judgment if the plaintiff ought to be admitted, &c. (as in the introduction.) Replication. That, although true it is that plaintiff did implead, &c., and that defendant did plead, &c., and that such proceedings were had in the said action in manner and form as defendant hath above in his said last plea in that behalf alleged, and although true it is that it was considered, &c. (stating the judgment in the former action, as in the plea,) in manner and form, &c.; for replication nevertheless, &c., that the said defendant of his own wrong, and without the residue of the cause in the said last plea alleged, broke the promise in the said declaration mentioned, so far as the same relates to the said cause of action in the first count of the said declaration mentioned: conclusion to the country. Joinder.

On the trial before WILLIAMS, J., at the Middlesex sittings in Easter term, 1837, it appeared that the defendant and plaintiff executed an instrument, entitled a memorandum of agreement, dated 15th June, 1835, between the defendant of the one part and the plaintiff of the other, the material parts of which were as follows.

"First.—The said Charles Temple, in consideration of the sum of 300*l.* to him now paid by the said William Palmer, as the said C. T. doth hereby acknowledge, (*by way of deposit, and in part of the sum of 5,500*l.* the consideration agreed between the parties to be given by the said W. P. for purchase of the messuage or tenement hereinafter mentioned, and for the trade,*" &c.,) "and of the residue of such purchase money to be paid as hereinafter stipulated, agrees that he and all (if any) other necessary parties will, on or before the 24th day of June instant, demise unto the said W. P., his executors, administrators, and assigns, or to such person as he shall appoint, all that messuage," &c.,

"for the term of," &c. (specifying term and rent.) "And the said C. T. agrees to deliver to the said W. P. the possession of the said messuage," &c., "on or before the said 24th day of June instant," &c. (Then followed stipulations for allowances to be made, and for the sale by defendant to plaintiff, by valuation, of certain property on the premises, with some other provisos, not material here.) "Secondly.—For the considerations aforesaid, the said W. P. agrees to accept such lease without requiring evidence of the title of the said C. T. to grant the same, other than," &c., "and to pay the said C. T. the sum of 5200*l.*, residue of the purchase money agreed to be given by him for the said messuage or public house, and the trade, &c., thereof, as before mentioned, on the execution of the said lease and the delivery thereof to him, and of the said licences duly assigned, and the possession of the said public house and premises as aforesaid. And he further agrees," &c. (as to payment for fixtures, &c.,) "and in all other respects to fulfil this agreement on his part; and at the same time execute and deliver a counterpart of such lease to the said C. T. Thirdly,"—(After a provision respecting the expence of completing the agreement,) "it is further agreed that, if either of the parties shall refuse or neglect to perform this agreement on his part, he shall pay unto the other of them, who shall be willing to complete the same, the sum of 1000*l.*, as or in the nature of liquidated damages, and to be sued for in any of his Majesty's courts of law of record accordingly." By a memorandum indorsed on the agreement, the time for carrying it into effect was extended to the 29th of June.

On the day last mentioned the agents of the parties attended, and the valuation was gone into, but was not completed till ten o'clock at night. Possession was demanded on behalf of the plaintiff at a quarter before twelve: the defendant's agent offered to give possession of the bulk of the property; but the plaintiff's agent insisted upon having actual possession of the whole, including certain cottages in which the tenants were then sleeping. The defendant's agent complained of such a demand being made at that hour of the night; but, upon the plaintiff's agent insisting upon having possession before twelve o'clock, offered to go and give possession immediately. The plaintiff's agent, however, after a little delay, said that it was too late, it being past twelve o'clock.

On 2d July, 1835, the plaintiff brought an action of assumpsit against the defendant for a breach of the agreement, and for money had and received. The defendant pleaded non assumpsit generally; and, to the count on an agreement,—First, that he was ready to perform, but the plaintiff was not;—Secondly, That the agreement was not performed, in consequence of the plaintiff refusing to complete unless the defendant would give possession of part of the premises, as to which plaintiff had discharged defendant from giving possession. Thirdly, That the completion of the agreement was prevented by the plaintiff not valuing the stock. Issues being joined on these pleas, the cause was tried before Lord DENMAN, C. J., at Guildhall, on 15th December, 1835, when the above facts were proved. It further appeared that on 21st July, 1835, the defendant had underlet the premises to a third party. No evidence was given showing a loss by the defendant in consequence of any difference in the terms of the two bargains. The Lord Chief Justice, in leaving the issues to the jury, told them, as to the count for money had and received, that the action would lie for the deposit, if the de-

fendant had broken the agreement, or if the contract had failed by mutual abandonment, but not if the plaintiff had broken it; but that the underletting on 21st July was not to be taken into consideration, the action having been commenced on the 2d; and his lordship left it to the jury to say whether the defendant did his part in performing the contract. (a) The jury found for the defendant, and, finally, a verdict was entered for him on all the issues, except so much of the issue on non assumpsit as related to the count on the agreement; and, as to so much, the verdict was entered for the plaintiff.

The plaintiff's counsel in the present action did not dispute the propriety of the finding of the jury in the first action; but contended that the plaintiff was now entitled to recover the deposit in consequence of the defendant having, by the underlease of July 21st, 1835, put it out of his own power to complete the agreement. Under the direction of the learned Judge, a verdict was found for the defendant on both issues, leave being reserved to move to enter a verdict for the plaintiff. In Easter term, 1837, *Thesiger* obtained a rule accordingly. In Michaelmas term last, (b)

Sir *J. Campbell*, Attorney-General, *Kelly*, and Sir *W. W. Follett*, showed cause. The defendant is entitled to retain the verdict on each issue. The money was not had and received to the use of the plaintiff, because the failure to perform the contract, which alone could give the plaintiff a right to demand the deposit back, was occasioned by himself. *Spratt v. Jeffery*, 10 B. & C. 249, (21 E. C. L. R. 64,) shows that a party who agrees to purchase, and makes a deposit, cannot recover it back if the other party has been ready to perform his contract. That was the position of the parties here, at the time when the agreement was to have been performed, at which time the plaintiff renounced the contract. It is now said that the defendant has altered the legal position of the parties, by making it impossible for himself to perform the contract. But he can no longer be called on to do so: the deposit is absolutely forfeited. [PATTESON, J. Could the plaintiff, by any act of his, destroy the defendant's right to sue for breach of contract, or to claim a specific performance? And, if the defendant retained such a right, must he not also have been answerable still for the deposit?] The defendant has such a right; but it does not follow that he is to answer for the money, except that the deposit will go in reduction of damages. [PATTESON, J. Suppose the damages were less than the deposit?] Then the verdict would be for nominal damages only; and the plaintiff would have occasioned the loss by his own fault. On any other view, the result would be that the defendant was perpetually bound to retain the property unsold. The deposit is made by way of indemnifying the seller against the breach of the agreement, with the understanding that, if the agreement be carried into effect, the money shall go in part payment, and, if not, it shall be retained as indemnity. [COLERIDGE, J.

(a) His lordship stated that the main question was, by whose default the agreement had remained unperformed; he observed that it was not necessary to the performance that possession should be given by actually turning out all persons upon the premises; and, even assuming that such necessity in general existed, he left it to the jury whether, from the circumstances, an understanding between the parties might not be inferred, that this proceeding was to be dispensed with. A motion was made for a new trial in the ensuing term, on the ground of misdirection, but the Court, after taking time for consideration, refused the rule; January 21st, 1836.

(b) November 19th and 20th. Before Lord Denman, C. J., Patteson, Williams, and Coleridge, Ja.

There is generally a clause providing that the deposit shall be forfeited in case the party contracting to purchase makes default: you say that such a clause is altogether superfluous.] (a) For legal purposes, it seems to be so; but possibly the equitable rights of the parties may be affected by it. [Lord DENMAN, C. J. I think we must take it that there was such a clause in *Spratt v. Jeffery*, 10 B. & C. 249, (21 E. C. L. R. 64.) The action for money had and received can be founded only on breach of contract producing a failure of consideration. But it is not pretended, that the defendant broke the contract: that was the act of the plaintiff: the plaintiff could neither sue for breach of contract, nor demand a specific performance. Such a right was extinct after his own renunciation of the contract; and nothing that has happened since can revive it nothing has been since done with reference to the contract. Suppose a party hiring a ship, which is to sail at a certain time, pays a deposit: if the hirer is not ready at the time, and the ship sails away, can he recover the deposit? So, if goods bought are to be delivered on a day named, and the purchaser pays the deposit, but refuses to accept on the day; can he recover the deposit? Or has he any claim whatever on the goods, whether retained in the vendor's warehouse, or sold to a third party? From the concluding part of the judgment in *Acebal v. Levy*, 10 Bing. 384, 5, (25 E. C. L. R. 170,) it appears that the present defendant, by reselling the property, did not preclude himself from suing the plaintiff for the breach of his contract. Suppose a master hire a servant for a time, and pay a sum down, and then refuse to receive him: clearly the hirer cannot recover back the deposit. But can it be contended that, if the servant, after the refusal, hire himself to a third person, he thereby gives the master a new right of action, and that, to avoid so doing, he must remain out of service for the whole time? No trace of such a principle appears in the books; and it is inconsistent with the intention of the parties giving and receiving a deposit. For the purpose of binding the bargain, a written agreement, or a small earnest, would suffice. In *Clark v. Upton*, 3 Man. & R. 89, a party agreeing for a purchase of land paid a deposit; the seller was unable to make a title on the stipulated day: and, afterwards, upon the purchaser entering into arrangements to compromise with his creditors, the seller was requested to cancel the contract and return the deposit; he refused to do either, but engaged not to enforce the contract: and it was held that he could not be sued for the deposit, on the ground that he had precluded himself from enforcing the contract. *Horford v. Wilson*, 1 Taun. 12; *Gray v. Gutteridge*, 1 Man. & R. 614, (17 E. C. L. R. 281.) and *Duncan v. Cufe*, 2 M. & W. 244, illustrate the general principle

(a) See Cod. Just. lib. 4. tit. xxi. 17. "Illud etiam adjicientes, ut in posterum si quis armis super faciendâ emptione cujuscumque rei datæ sunt, sive in scriptis, sive sine scriptis: licet non sit specialiter adjectum quid super iisdem armis non procedente contractu fieri oporteat, tamen et qui vendere pollicitus est, venditionem recusans in duplum eas reddere cogatur, et qui emere pactus est, ab emptione recedens, datæ a se armis cadat, repetitione earum denegandâ." See Pothier, *Traité du Contrat de Vente*, part vi. ch. 1. art. 3. § 1. (498.) "Cette convention étant de la nature du contrat d'arrhes, il n'est pas nécessaire qu'elle soit expresse." (*Œuvres*, tom. i. p. 648, 2d ed.) These remarks apply to a deposit made before the bargain is complete, in which case either party may recede, (as in *Savile v. Savile*, 1 P. W. 745,) but will forfeit as above. Where the deposit is made after the sale is complete, the parties cannot recede, even upon the above terms of forfeiture, unless this has been expressly provided for; though it seems that a different view has sometimes been taken, by civilians, of the effect of the deposit in this case. See the same article in Pothier, § 2. (507.)

that the party failing loses the deposit. [PATTESON, J. If a horse be warranted, and the price paid for him, and he turn out unsound, can the seller, if he take the horse back, retain the purchase money ?] There the contract is rescinded by mutual consent: it is not an instance of a contract simply broken by failure on one side. (a) [Lord DENMAN, C. J. Time seems to be of the essence of the contract.] That is so at law; 1 Sugden's Vend. and Purch. 404, (ed. 10;) and it shows conclusively that the contract was broken by the plaintiff. On the second issue, also, it is clear that the original action was brought for the very deposit now in question. The defence which existed then exists now. [PATTESON, J. As things then stood, there was no right to recover, because the defendant was still in a condition to insist upon the contract. That is now altered.] The parties stand as before, unless there be a new right of action created by the defendant having underlet.

Thesiger and *Ogle*, *contrà*. First, as to the issue on non assumpsit. The 300*l.* was, properly, a deposit only by way of part payment of purchase-money. It was not a security for the performance of the plaintiff's agreement. That appears, both by the absence of a clause of forfeiture, and by the clause respecting the 1000*l.* to be paid by either party refusing to perform, (which, according to *Kemble v. Farren*, 6 Bing. 141, (19 E. C. L. R. 34,) cannot be taken as liquidated damages;) for, as provision is expressly made for the penalty to be paid upon the default of either party, the deposit cannot be understood to have been made with that intention. It does not appear that the plaintiff broke the agreement; but only that the defendant, up to the time of his underletting, had not broken it. Had the defendant filed a bill for a specific performance, the 300*l.* would have been treated as part payment; and it would have gone in reduction of damages had he brought an action for the non-performance of the contract. It was not therefore absolutely forfeited. It is said that it would be unreasonable to require a seller to hold the property always in his hands: but he can always part with it on paying back his deposit. *Spratt v. Jeffery*, 10 B. & C. 249, (21 E. C. L. R. 64,) is inapplicable. It shows that, at the time when the first action was brought, and before the defendant had underlet, the plaintiff could not recover his deposit: but it does not show that the defendant may retain it when he has disabled himself from performing the agreement. If goods be sold, to be delivered and accepted on a certain day, and the buyer refuse to accept, he cannot recover his deposit: but, if the seller afterwards disposes of them, he can no longer retain the sum paid, except to cover any loss on the sale. As to the case put of hiring a servant, the offer of the servant to serve, and the refusal by the master, is tantamount to an actual service; for the servant has a right to sue for the wages of the whole quarter. (*Smith v. Hayward*, 7 A. & E. 544, (34 E. C. L. R. 154,) seems *contrà*.)—[Lord DENMAN, C. J. If he hire himself to another, can the first master call upon him to serve according to the original bargain? He cannot: because he has set the servant at liberty by refusing to take him. [Lord DENMAN, C. J. Then how can the plaintiff here call for the performance of the defendant's contract?] The case put of the hiring of a ship does not apply: because, after the ship sails on the appointed

(a) See *Street v. Blay*, 2 B. & Ad. 456, (22 E. C. L. R. 722;) *Gompertz v. Denton*, 1 C. & M. 207. S. C. 3 Tyrwh. 232; *Pateshall v. Tranter*, 3 A. & E. 103, (30 E. C. L. R. 39.)

day, the parties can no longer be replaced in the same position. Secondly, if the action for money had and received lie at all, it clearly is upon a right which has arisen since the first trial; so that the defendant will not be entitled to a verdict on the second issue more than on the first. [On this point, they were stopped by the Court.]

Cur. adv. vult.

LORD DENMAN, C. J., in this term, (January 14th,) delivered the judgment of the Court.

This motion for a rule to enter a verdict for the plaintiff, according to leave reserved by my brother WILLIAMS at Nisi Prius, led to a discussion of the most general nature, that is, whether one contracting for the purchase of landed property, who refuses to complete his contract, may recover the deposit from the vendor, on his afterwards selling the property to another. The plaintiff contended that, though the defendant might have sued for a specific performance, or for damages sustained, for breach of the contract, he lost the right to detain the money deposited, by disabling himself from fulfilling his own part of the bargain. The defendant's argument was, that the money was originally received by him to his own use, not the plaintiff's, and was meant to be forfeited if the plaintiff should fly from his contract; money so deposited, though not to be called earnest in strictness of speech, being, in fact, for this purpose, in the nature of earnest; that the vendor could not be expected to keep his property always unsold, and might possibly be a loser to a greater extent than the amount of the deposit.

No authority bearing directly on the question was quoted, either from report or text-book. But Sir E. Sugden's work on *The Law of Vendors and Purchasers* refers (vol. i. p. 128, 10th ed.) to a case of *Savile v. Savile*, 1 P. W. 745, where Lord MACCLESFIELD held, in conformity to a then recent decision, that a purchaser had a right to abandon his contract, on forfeiting his deposit, and no more. It was not questioned that the deposit must be forfeited. Probably, however, a clause to that effect may have formed a part of the contract; in which case the decision would prove nothing as to the nature of a deposit, taken by itself. This is so reasonable and so prevailing a practice, that it is highly probable the general question may never come to be decided; for we do not feel it open to us on the present occasion.

The ground on which we rest this opinion is, that, in absence of any specific provision, the question, whether the deposit is forfeited, depends on the intent of the parties, to be collected from the whole instrument: but, as this imposes on either party that should make default a penalty of 1000*l.*, the intent of the parties is clear, that there should be no other remedy.

This fact was mentioned when the rule nisi was obtained by Mr. *Thesiger* for the plaintiff, in the course of the argument. The consequence appears to be that this vendor may sue for the penalty, and recover such damages as a jury may award: but he cannot retain the deposit; for that must be considered, not as an earnest to be forfeited, but as part payment. But the very idea of payment falls to the ground when both have treated the bargain as at an end; and from that moment the vendor holds the money advanced to the use of the purchaser.

There was a second plea of judgment recovered. And, in fact, the plaintiff had sued the defendant for this very deposit, and the verdict had passed against him. But the evidence showed the ground of that.

verdict to be that the action was prematurely brought, viz. before the contract was rescinded, and before the defendant had disabled himself from completing it. The former judgment forms no obstacle to the recovery, now that that event has taken place. It is like an action brought for the price of goods before the credit had expired, which would not prevent a recovery for the same goods after that period.

The rule, therefore, for setting aside the verdict for the defendant, and entering one for the plaintiff, with 300*l.* damages, must be made absolute. But, as the defendant may have his cross action against the plaintiff on the clause in the agreement before cited, the reasonable course would be to refer to arbitration the question whether the damages should be reduced, and to what amount, or whether the defendant is entitled to recover more than 300*l.* for breach of his contract, giving the arbitrator power to award accordingly. But, at any rate, this verdict must finally stand for some damages, as the deposit was held by the defendant for the plaintiff's use, as soon as the fulfilment of the contract became impossible by the defendant's act.

Rule absolute.

In the Matter of Arbitration between BROWN and the CROYDON Canal Company.—p. 522.

A canal company agreed with B. for the use of an engine constructed by him, during a term of years, they paying a stipulated annual sum. In the course of the term, disputes arising, the parties put an end to the agreement, and referred all matters in difference between them to arbitration. On the reference, B. claimed, among other things, compensation for future loss, in respect of the part of the term unexpired. The company stated a set-off. The arbitrators, by their award, reciting the submission to arbitration, and that they had heard and considered all the evidence of each party, and investigated all the accounts and vouchers touching the matters in difference, adjudicated (not saying that they did so of and concerning the matters referred) that there was due from the company to B. 515*l.*, which they directed the company to pay him.

On motion to set aside the award, on the grounds, 1. That it was not final, inasmuch as no decision appeared touching the future damage, 2. That it was uncertain, 3. That it left a doubt whether or not the set-off had been considered,
Held, that the award was sufficient.

By agreement, March 16th, 1830, between Samuel Brown, engineer, and the company of proprietors of the Croydon canal, Brown agreed that he would sell to the company, and erect for them, a patent gas vacuum engine, by May 21st then next, and would work the engine and keep it in repair for fourteen years next following the said 21st May, and find fuel, gas, &c., and would by this means supply constantly the upper level of the canal with water: and the company agreed that they would pay Brown for the purchase and erection of the engine 300*l.*, and re-imburse him the expense (not exceeding 120*l.*) of erecting an engine-house, the payments to be made by three equal annual instalments (with interest) from May 21st; and that they would pay him, for working the engine for fourteen years, and finding fuel, &c., 100*l.* a year. The agreement also contained provisions in favour of the company, in case of certain specified defaults by Brown: and there was a stipulation that, if Brown should at any time wish to exhibit the engine and its mode of working to any person, he should be at liberty to do so, provided the regular supply of water to the canal were not interrupted.

Disputes having arisen between Brown and the company as to certain sums claimed by him under the agreement, and compensation demanded by him in consequence of the agreement being put an end to by the company, and as to an alleged set-off on their part, the company and Brown executed arbitration bonds, May 27th, 1837, whereby, after reciting that certain disputes and differences had arisen between them, and they had agreed to refer the said disputes and differences, and all actions, causes of action, suits, controversies, trespasses, damages and demands which at any time theretofore had been had, made, moved, &c., or depending between them, to certain arbitrators, (engineers,) the condition of each bond respectively was declared to be that the obligor should stand to and obey the award of the arbitrators.

On the arbitration, Brown made the following claims.

Two instalments, with interest	-	-	-	-	£350
Five years' payment for working the engine	-	-	-	-	500
Eight years' payment for ditto for the residue unexpired of the term of fourteen years	-	-	-	-	800
Loss of profit from sale of coke, tar, &c., which might have been made during the last mentioned period	-	-	-	-	680
Loss of opportunity of exhibiting the engine and trying experiments with it	-	-	-	-	500
Use of ground adjoining the engine for the residue of the term					80
Buildings erected, and articles left in the engine	-	-	-	-	94
					<hr/>
					£3004

The arbitrators, by their award, after reciting the submission bonds, adjudicated as follows. We the arbitrators, &c., "having taken upon ourselves the burden of the said arbitration and umpirage, (a) and having fully heard and maturely considered all the evidence produced by and on behalf of each of the said parties in difference, and having carefully investigated and examined all the accounts and vouchers produced before us touching the matters in difference, and to us referred in manner aforesaid, do hereby make and publish our award and umpirage in writing in manner following. We do find and award that there is justly due and owing from the said company of proprietors of the Croydon canal to the said Samuel Brown the sum of 515*l.* 16*s.* 7*d.*; and we do order and award the said company of proprietors of the Croydon canal to pay the said sum of 515*l.* 16*s.* 7*d.* to the said Samuel Brown; and we do hereby further order and award that the costs of the reference and award be borne by the company."

Sir *W. Follett*, in Michaelmas term, 1837, moved, on behalf of the company, for a rule to show cause why the award should not be set aside, on the grounds: 1. That it is not final, inasmuch as it determines only as to the amount of debt due from the company to Samuel Brown at the time of making the award, and omits to decide on any of the other matters in difference between the parties. 2. That the award is void for uncertainty. 3. That the award leaves it in doubt whether the arbitrators, in finding the sum due to Brown, have taken into account the sums which the company claimed to set off against Brown's demand, and whether the sum of 515*l.* 16*s.* 7*d.* found due to him, is the

(a) An umpire was to be appointed in case of disagreement, and the award was executed by such umpire (an engineer) together with the arbitrators.

balance due to him after deducting such sums, or is still subject to such deductions. 4. That the award does not determine all the matters in difference. A rule nisi was granted.

By the affidavits for and against the rule, it appeared that each of the items in Brown's claim was matter of discussion before the arbitrators; that witnesses were called on both sides; and that, on the arbitration, the company disputed their liability to pay Brown more than 200*l.*, against which they claimed to set off two items of 38*l.* and 30*l.*: that throughout the arbitration, the avowed object of both parties was to ascertain and reduce the final balance to be paid by the company: that no other claim, demand, or deduction than those above mentioned was put in or referred to; that every matter brought under the notice of the arbitrators was discussed before them and noted down by them; and that all demands, deductions, and allowances between the parties were left to them to decide.

Kelly and *Petersdorff* now showed cause. Though the award does not show the specific items of claim awarded upon, it is not uncertain. The test of an award being final or certain is, whether it would operate as a bar to future proceedings between the parties as to the same matters. This award would be such a bar if it were pleaded, and the subject matter identified with that of the suit. All the matters in dispute were before the arbitrators: they award that so much is due; and it must be taken that such award was made with a view to the necessary deductions. *Gray v. Guennap*, 1 B. & Ald. 106, and *Platt v. Hall*, 2 M. & W. 391, show that the adjudication as here made is sufficient. This is an award of unprofessional arbitrators. [Lord DENMAN, C. J. That distinction has been long done away with.] The circumstances may be regarded in construing expressions.

Sir *W. W. Follett* and *Fish*, contra. The award is not stated to be of and concerning the matters in difference; but that objection is not now insisted upon. It appears here that several matters in dispute were before the arbitrators, and that all were not adjudicated upon. The statement that the company owe Brown 515*l.* 16*s.* 7*d.* is consistent with the supposition that that, as a liquidated sum, was due under the agreement at the time of making the award, but that the contingent damages on the termination of the agreement are not provided for. [LITTLEDALE, J. An arrangement was made for terminating the business carried on by means of the engine. The loss to Brown was referred to arbitrators, who found a certain sum due. The contingent damages were referred as well as the rest. It was not necessary that all the items of compensation should be stated in the award.] Here nothing is stated to show that the prospective claims were taken into consideration. The award presents the same uncertainty which was held to be fatal in the case *In the Matter of Rider and Fisher*, 3 New Ca. 874, (32 E. C. L. R. 363.) It might have been said there, as justly as in the present case, that the award comprehended all the matters referred. An award like this would be no answer to an action for demands under the agreement, not existing at the time of the adjudication, but accruing afterwards. [Lord DENMAN, C. J., said that there was weight in this objection, and proposed that it should be referred to the arbitrators to state what their intention was as to such demands, but this was not acceded to.] In an action where there is a set-off, it is not sufficient to award generally that a sum is due to the plaintiff; but the set-off must be adjudicated

upon.(a) [LITTLEDALE, J. Many awards on orders of nisi prius would have been set aside by such a rule.] The arbitrators here do not find that, upon the whole of the matters alleged on each side, so much is due from the company; but merely that, "having fully heard and maturely considered all the evidence" produced by each party touching the matters in difference, they "award that there is justly due" from the company to Brown such a sum. Where awards in general terms, upon several matters in difference, have been upheld, it has sufficiently appeared that the adjudication applied to all the matters; *Dicas v. Jay*, 6 Bing. 519, (19 E. C. L. R. 155,) and *Day v. Bonnin*, 3 New Ca. 219, (32 E. C. L. R. 91,) exemplify the rule on this subject. In *Gyde v. Boucher*, 5 Dowl. P. C. 127, where it was doubtful whether one of the matters referred had not been excluded from the award, it was set aside as uncertain. This is a similar case. [*Kelly*. In the case *In the Matter of Rider and Fisher*, 3 New Ca. 874, (32 E. C. L. R. 363,) the arbitrator was expressly called upon by the arbitration bond to adjudicate on certain points, and the award did not notice these.]

LORD DENMAN, C. J. Upon a reference to arbitration of all matters in difference between these parties, the arbitrators, after "having fully heard and maturely considered all the evidence produced by" each, and investigated all the accounts and vouchers produced touching the matters in difference and referred, have awarded that there is due from the company to Brown 51*l.* 16*s.* 7*d.*, which they order the company to pay. An objection is raised on affidavit that there were several distinct matters in difference, and, particularly, contingent damages, all of which were brought before the arbitrators; and the question is, whether the award can be reasonably taken as a decision upon all those matters. It is admitted (and there is authority to that effect) that an award need not formally express that the arbitrator adjudicates on every matter in difference. Here the affidavit which raises the objection shows that the particulars of Brown's claim did raise the question of contingent damage; and that the arbitrators found on that, fusing as it appears, the whole of the claim allowed by them into one set of damages. It is questioned whether this award would bind the rights of the parties on pleading in a future action as to the same points. In such an action, evidence must be given to show what was the subject of adjudication on the reference; and, upon such evidence, Brown would be concluded by his present particulars of claim. The rule must therefore be discharged.

LITTLEDALE, J. I am of the same opinion. Comparing the submission bonds with the recital in the award immediately preceding the adjudication, ("we," "having fully heard and maturely considered all the evidence," &c.,) I think it is clear that the award is upon all the matters in difference. It does not purport to be made "of and concerning the premises,"—but that, according to the later decisions, is not necessary. The award, therefore, is not bad on the face of it. Nor is any sufficient objection raised on affidavit. As to the set-off; if sums

(a) Reference was made on this point to a case said to have been decided last term by the Court of Exchequer. In *Duckworth v. Harrison*, 4 M. & W. 432, decided in that court in Michaelmas term, 1838, a cause was referred, in which two issues had been joined, one upon a set-off; and the award was general; it was objected to the award, that the set-off should have been specifically adjudicated upon; but the Court said that, "if the parties had intended that the arbitrator should award distinctly upon each issue in the action, they ought to have stated it."

are claimed on one side, and set off on the other, I do not think it is necessary that the claims on each side should be noticed by the award; it is sufficient to state the balance. Then it is said that, in this case, a future debt was in difference, and it should have appeared how much was due for that. It is clear that an arbitrator on a reference of matters in difference has power over all matters down to the period of the submission, but cannot award on future and contingent claims. The parties, however, may give him such a power if they think fit; and the arbitrator will then award what is due on each account. That power being given here, it is said that the award ought to have shown what was due at the time of the submission, and what was the claim for future damage. I see no reason for that. If an action were brought for any part of the contingent damage subsequently arising, the award might be pleaded in bar; and, with a view to that, it would certainly be more desirable that arbitrators, in such a case as this, should set out what is allowed for present and what for future damage. But this is not strictly necessary; the subject-matters of the adjudication may be explained afterwards by evidence, as is done in many cases arising on awards. This part of the question turns more upon what is reasonable and convenient, than what is necessary. There is no ground for making the rule absolute.

WILLIAMS, J. The agreement had several years to run at the time of the submission; and, unless Brown's claim in respect of that part of the contract had been put an end to, he might have had an action in respect of it at some future period. It is contended that the arbitrators have not decided upon that claim. But the third item of the particular includes it; and what is there to show that it was not considered? The sufficiency of the award may be tried by asking whether it would be a good defence in an action for loss in consequence of the term being put an end to; and, if those claims actually were brought before the arbitrators and considered by them, that fact might clearly be shown in such an action, to support a defence grounded on the award.

COLERIDGE, J. This award cannot be pronounced uncertain, independently of matters stated on affidavit, unless it can be said that in every instance of such an award the recital must specify the subjects in difference, and the disposing part refer to them. That might be convenient, because then, in an action subsequently brought upon any of the matters referred, the award would give a complete defence. But there is no such rule. The award here must, I think, be taken to be a finding upon the several subjects of the reference: *Platt v. Hall*, 2 M. & W. 391, shows that a more particular statement was not necessary. In *Gray v. Gwennap*, 1 B. & Ald. 106, on the trial of an action of tort, all matters in difference were referred; and, upon the reference, a pecuniary claim of the defendant on the plaintiff was taken into consideration. The arbitrator made his award, not saying "of and concerning the premises," and ordered a verdict to be entered for the plaintiff with 2224*l.* damages. Those words seemed to exclude any notion of a pecuniary set-off having been taken into consideration; yet, as it appeared on affidavit that that claim had been a subject of inquiry, the award was held sufficient. In the present case, the arbitrators have found so much to be due on the whole; and there is nothing on the affidavits to show that they have not decided every matter in dispute. It does not appear, on a fair construction of the

affidavits, that the arbitrators did not take into account the contingent damages; there is only an absence of any direct statement that they did consider them. The award would be a defence in a future action if it appeared by parol evidence that the subject of the action was before the arbitrators on the reference. Some hardship might arise if such proof became necessary after a lapse of years: but that observation would apply to every case where an award is made the defence to an action. Some identification by parol evidence will always be necessary. The question of hardship is only a question of degree.

Rule discharged. (a)

(a) See *In the Matter of Gillm and The Mersey and Clyde Navigation Company*, 3 B. & Ad. 493, (23 E. C. L. R. 128;) *Doe dem. Madkins v. Horner*, 8 A. & E. 235, (35 E. C. L. R. 382.)

DOE on the Demise of STEPHENS against LORD.—p. 531.

This case is reported, 7 A. & E. 614.

BABER against HARRIS.—p. 532.

Where a lessee assigns and grants over his lease by deed, not containing a covenant for quiet enjoyment, or for indemnity against demands of rent due to the superior landlord before assignment, the assignee, if distrained upon for such rent, may bring an action of covenant against the assignor, founded on the word "grant" in the deed.

And consequently, if, upon such distress, he has paid the rent to release his own goods, he cannot sue the assignor in assumpsit for the amount paid.

Although the assignor, after such distress and payment, has promised the plaintiff to repay him the amount; at least if there be not a new consideration for such promise; as forbearance.

ASSUMPSIT for money lent, money paid, and money had and received, and on an account stated. Plea, non assumpsit.

On the trial before Lord DENMAN, C. J., at the sittings in London after Michaelmas term, 1836, it appeared that the defendant, being possessed of certain leasehold premises for the residue of a term, sold his lease, and assigned it by deed, in February, 1836, to the plaintiff, who entered, and was afterwards distrained upon for rent due from the defendant at Christmas, 1835. The plaintiff, to liberate his goods, paid the rent. The defendant, being informed by him of the transaction, wrote two letters, expressing regret, and promising him to repay what he had advanced.

The assignment shortly recited the demise to defendant, and the agreement between him and plaintiff for the assignment; and it was then witnessed that defendant bargained, sold, assigned, granted, transferred, and set over the premises to plaintiff, habendum from 25th March, 1836, for the residue of the term granted by the lease, subject to payment of the rent and performance of the covenants by plaintiff, from March 25th, according to the original lease. Defendant covenanted for the validity of the lease, and his own title to assign, and also that plaintiff, his executors and assigns, paying the rent and keeping the covenants, &c., should quietly enjoy the premises, without let, hindrance,

&c., from or by defendant, his executors and assigns, or any person or persons claiming by, from, or under him, them, or any of them. Plaintiff covenanted to pay rent and keep the covenants.

The defendant objected that assumpsit was not the proper form of action; and Lord DENMAN, C. J., reserved the point. Verdict for plaintiff. In the ensuing term *Stammers* obtained a rule to show cause why a nonsuit should not be entered. In Michaelmas term, 1838.

Bagley showed cause. (a) First, where parties have contracted under seal, but, from the relation between them, an implied contract arises, independent of the engagement under seal, assumpsit lies. That principle was recognized in *Burnett v. Lynch*, 5 B. & C. 589, (12 E. C. L. R. 327,) and is supported by *Kinlysides v. Thornton*, 2 W. Bl. 1111. Here it resulted from the transaction between the plaintiff and Harris (but was not expressed in the deed) that Harris should protect the plaintiff from liability in respect of the rent due to the superior landlord: and *Hancock v. Caffyn*, 8 Bing. 358, (21 E. C. L. R. 318,) shows that an action on the case lies for breach of such a duty arising by implication. Secondly, the letters in this case show an express promise by the defendant after the breach of covenant; and on this, at all events, the action lies. In Com. Dig. *Action upon the Case upon Assumpsit*, (C,) it is said, "An assumpsit lies," "upon an express promise to pay a debt upon specialty, upon a new consideration; as in consideration of forbearance, &c." "So, it lies for rent, upon an express promise; for it appears, that he intended to give him a double remedy;" to which point *Johnson v. May*, 3 Lev. 150, and other authorities are cited. "And this, after an assignment of the lease, and an acceptance of rent from the assignee." In *Foster v. Allanson*, 2 T. R. 479, partners had mutually covenanted to account at the expiration of their partnership; the account was taken and a balance struck; the partner who was found debtor promised to pay; and it was held that assumpsit lay on that express promise. *Moravia v. Levy*, 2 T. R. 483, note (a), is to the same effect. So here, a new contract was superinduced upon the contract under seal, and was properly sued upon in assumpsit. In *Schlenker v. Moxsy*, 3 B. & C. 789, (10 E. C. L. R. 227,) which will be relied upon for the defendant, assumpsit was held not maintainable against a mesne landlord for omitting to indemnify his sub-lessee, the plaintiff, against rent due to the ground landlord, the under-tenancy being created by deed; but that judgment rested on the assumption that an action on simple contract was brought for breach of an express contract contained in the deed. In *Bulstrode v. Gilburn*, 2 Stra. 1027, the action of assumpsit was brought for a direct breach of the defendant's covenant to account. And in neither of these cases was there any subsequent promise. Here it must be taken, after verdict, that an express promise, on proper consideration, was proved; *Trevelyan v. Roberts*, Hardr. 366. The recovery in this form of action will not prejudice the defendant; for it might be pleaded in bar to an action hereafter on the covenant; *Blake's Case*, 6 Rep. 43 b.

Stammers, contra. There is nothing to exempt this case from the rule that assumpsit does not lie as on simple contract, where the party has a remedy on security of a higher nature. "The party must proceed in debt or covenant where the contract is under seal," "even though

(a) November 19th. Before Lord Denman, C. J., Patteson, Williams, and Coleridge, J.

the debtor, after such contract were made, expressly promised to perform it;" 1 Chitty on Pleading, 103, 6th ed. In *Burnett v. Lynch*, the judgment of ABBOTT, C. J., went partly on the ground that an action of covenant would not lie. In *Foster v. Allanson*, and *Moravia v. Levy*, there had been an actual statement of account. Here an action would lie on the assignor's covenants in the deed of assignment; and, if that be so, it follows that, as was said in *Schlenker v. Mozsy*, the express contract by deed excludes any implied contract. The promise after breach, alleged here, is only a promise to do what the party was bound to do by the deed, and will not, therefore, support an action of assumpsit; *Green v. Harrington*, Hutt. 34; *Anonymous Case* in Cowper, 1 Cowp. 123.

Cur. adv. vult.

LORD DENMAN, C. J., now delivered the judgment of the Court.

The only question in this case is, whether under the circumstances an action of covenant could be maintained upon the indenture of assignment from the defendant to the plaintiff; for, if it could, no action of assumpsit upon an implied promise to indemnify will lie. This doctrine is clearly established in many cases; amongst others in *Bulstrode v. Gilburn*, *Toussaint v. Martinnant*, 2 T. R. 100, and *Schlenker v. Mozsy*. An express promise to pay, if proved, which it was not, could make no difference, at all events without a new consideration, such as forbearance; (a) and nothing of that kind was attempted to be shown.

Now it is said that this indenture does not contain any express covenant to indemnify against the rent due to the superior landlord, nor for quiet enjoyment. But, if the plaintiff be disturbed in his possession, which he is when distrained upon for rent, an action of covenant will lie upon the word "grant" in the indenture of assignment, which brings this case directly within the authorities above alluded to. This rule for a nonsuit must, therefore, be made absolute.

Rule absolute.

(a) See *Morton v. Burn*, 7 A. & E. 19, (34 E. C. L. R. 18.)

WILKINSON and Another against GODEFROY.—p. 536.

Plaintiffs agreed with G. to pay him 25*l.* if he performed certain work to the satisfaction of a referee, and that a cheque for the 25*l.* should be deposited with defendant, to be handed to G. if the work succeeded; if not, to be returned to the plaintiffs. The check was so deposited; and defendant presented and obtained cash for it. Afterwards the referee disapproved of the work; but no decision by him was communicated to defendant.

Held, that the action was brought prematurely in respect of the alleged failure of the experiment: And that the turning of the cheque into money by defendant was not a breach of his duty, as stakeholder, which entitled the plaintiffs to recover back the 25*l.* from him as money received to their use; it not appearing by the evidence that the parties had contemplated any distinction between a cheque and money.

ASSUMPSIT for money had and received. Plea, non assumpsit. On the trial before LORD DENMAN, C. J., at the sittings in London after last Michaelmas term, the following facts appeared. The plaintiffs, silk dyers, were informed that Peter Godefroy, the defendant's son, had discovered an improvement in the art of dyeing; and they agreed with P. G. that he should dye some silk for them; that, if the colour should be approved of by a Mr. Beckwith, the plaintiffs should pay P. G. 25*l.* for

the communication of the method; and that a cheque for the 25*l.* should be deposited by the plaintiffs with the defendant, to be handed over to P. G. if Beckwith approved of the colour, but, if not, to be returned to the plaintiffs. (b) They drew a cheque for 25*l.*; and on September 2d, 1838, it was deposited with the defendant on the terms above stated. The experiment was made; and, according to the plaintiffs' witnesses without success. It appeared that P. Godefroy threw the blame upon the workmen. Beckwith (who was called as a witness) disapproved of the dye; but no decision by him was communicated to the defendant. On September 3d (before the experiment was complete) the defendant obtained payment of the cheque from the bankers on whom it was drawn. On 18th October, 1838, the plaintiffs' attorneys wrote to the defendant: "We are requested by Messrs. Wilkinson and Claxton to apply to you for the repayment of 25*l.* which has been handed to you in consideration of your imparting to them a secret in the art of dyeing, in which you have failed. If this application be attended to immediately, Messrs. W. and C. will not call upon you for the damage done to their silk, which you have entirely spoiled; but if the amount is not repaid in the course of this week, proceedings will be taken against you for the recovery of the 25*l.*, and also for the value of the silk which you have damaged." On this case the defendant's counsel contended that the action against him as a stakeholder must fail, for want of a proper notification to him, before action brought, that Beckwith had pronounced the experiment unsuccessful. The plaintiffs' counsel contested this point; and they also urged that, at any rate, the defendant, as stakeholder, was bound to keep the cheque till the result of the experiment had been decided; and that, on his turning it into money, he became liable to the present action. The Lord Chief Justice was of opinion that the action was brought prematurely, as the decision of Beckwith had not been communicated to the defendant, and it did not appear that P. Godefroy might not, on a further experiment, have succeeded; and, further, that the defendant had not committed a breach of trust in cashing the cheque. The plaintiffs were therefore nonsuited.

Sir J. Campbell, Attorney-General, now moved for a new trial, and contended that the Lord Chief Justice's ruling was erroneous on both points. On the latter he urged that, by the agreement under which the cheque was deposited, the defendant was to hold to it, not to receive money for it, and was ultimately to hand it over to the party entitled; that his turning it into cash was a breach of trust, the plaintiffs not having contemplated entrusting him with money; and that, on receiving the 25*l.* at the bankers', he became liable for that amount as money had to the plaintiffs' use: and that the plaintiffs were in reality prejudiced by the defendant's act, the money being withdrawn from their own bankers, and subjected, by lying in the defendant's hands, to risk which the plaintiffs had not meant to incur.

LITTLEDALE, J. I am of opinion that the ruling of the Lord Chief Justice was right in both respects. The plaintiffs had no right to recover till Beckwith's judgment was communicated to the stakeholder. The money and cheque were the same thing. The defendant did not become such a wrong doer, by cashing the cheque, as no longer to be stakeholder. It might be more convenient that the check should be

(b) The witness's expression on cross-examination was, that, if the colour were not approved of, the money should be returned to the plaintiffs.

changed. And the contract between the plaintiffs and Godefroy the younger was a contract as to money.

WILLIAMS, J. I am of the same opinion. Beckwith was to be the judge; and his decision was never communicated. It is evident that a cheque was treated by the parties as money.

COLERIDGE, J. I was struck at first with the observation as to the effect of cashing the cheque. But the parties had agreed to treat a cheque as money. The argument raises a fallacy, in confounding the son's rights with the defendant's duties. Then, as the defendant was bound to retain the money till Beckwith's judgment was communicated, no right of action accrued before that time. No rule can be granted.

Lord DENMAN, C. J., concurred.

Rule refused.

The QUEEN against The Justices of MIDDLESEX.—p. 540.

On appeal at quarter sessions against a county rate, the sessions, in 1837, dismissed the appeal, subject to the opinion of this Court on a case. The case directed that, if this Court should think the appellants entitled to relief on the objections taken, the rate should be amended in a particular which was specified. A certiorari was obtained, to remove into this Court the order of sessions, with all things touching the same. The sessions sent up the order and special case, but not the rate. This Court quashed the order. At the ensuing sessions, December, 1838, a motion was made to quash the rate; but the justices refused. No continuances had been entered on the appeal. On motion for a mandamus to the justices to enter continuances to their next sessions, and at those sessions quash the rate,

Writ refused: for, per Lord DENMAN, C. J., and LITTLERDALE, J., if the rate were quashed otherwise than on certiorari, parties who had acted in collecting it would lose the protection given to such persons by stat. 12 G. 2, c. 29, s. 18, in the case of a rate being quashed.

And, per LITTLERDALE and COLERIDGE, Js., the quashing of the rate being a judicial act (under a local statute, 3 G. 4, c. cvii.,) this Court could not order them by mandamus to perform it.

And, per COLERIDGE, J., Semble that a mandamus could not go, because the sessions, when called upon to quash the rate, had not power to do so.

By stat. 3 G. 4, c. cvii., (local and personal, public,) if a county rate for Middlesex be made before it appears to the justices that three fourths of the last preceding rate are expended, the order for the rate is to contain a proviso suspending the collection till the three fourths are expended. If a rate be otherwise made, appeal is given to the quarter sessions.

An order for a rate recited that the three fourths were expended, and did not contain the proviso. A party, not having appealed, applied for a certiorari to bring up the rate, and affidavits suggesting that the three fourths had not been expended. Certiorari refused.

A RULE nisi was obtained in this term, for a mandamus calling upon the justices of Middlesex to enter continuances to their next quarter sessions on the appeal of the churchwardens and overseers of the poor of St. George, Hanover Square, against a county rate made by the justices of the said county on 27th October, 1836, and at such next quarter sessions to quash the said rate.

The rate had been appealed against at the January sessions, 1837, under stat. 3 G. 4, c. cvii., local and personal, public. (a) The ground

(a) Stat. 3 G. 4, c. cvii. (local and personal, public,) is entitled, "An Act for regulating the Office of Treasurer, and altering and amending the Acts now in force for assessing, collecting, and levying of County Rates, so far as the same relate to the County of Middlesex."

Sec. 1 recites stat. 12 G. 2, c. 29, 18 G. 2, c. 18, 37 G. 3, c. 65, 55 G. 3, c. 51, 56 G. 3, c. 49, 57 G. 3, c. 94, 1 & 2 G. 4, c. 85.

Sec. 9 authorizes the justices of the peace of Middlesex, at general quarter sessions, &c., after the treasurer's accounts have been audited and allowed as mentioned in the act, to make quarterly county rates.

Sec. 10 enacts, "That in case, at the time of making any such quarterly rate or rates

of appeal was that, when the treasurer's accounts were audited on the first day of the October sessions, 1836, three-fourths of the sum received under the last rate had not been expended, but that nevertheless the order for making the new rate did not contain a proviso, according to sect. 10, for suspending the further collection of moneys till the said three-fourths of the former rate should be exhausted. An account had, however, been delivered at an adjournment of the last-mentioned sessions, before the making of the rate, by which it appeared that three-fourths of the former rate had then been expended. The appeal was dismissed, subject to the opinion of this Court on a special case. The case, (settled by the chairman,) after setting forth the facts, directed that, if this Court should think the appellants entitled to relief on the above objection, the rate should be amended, (by an alteration in the date,) according to stat. 3 G. 4, c. cvii. s. 16.

The order of sessions, with the case, was removed into this Court by a certiorari commanding the justices to send up the order with all things touching the same, but not requiring the rate to be transmitted. A rule nisi was obtained for quashing the order: the case was argued in Michaelmas term, 1838; (a) and this Court, being of opinion that the state of the account on the day of audit, and not afterwards, should have been considered in framing the rate, quashed the order of sessions. At the meeting of the justices on their next county day, the chairman informed them of the decision; but stated that the justices would not be inconvenienced, as the rule made by this Court did not quash the rate. At the Middlesex sessions in December, 1838, a motion was made, on affidavit verifying the special case and the decision of this Court, to quash the rate; but the sessions refused to interfere, the chairman saying that the appeal was no longer before them, and they had no power to do anything in the matter.

as aforesaid, it shall not be made appear to the said justices that three-fourths or more of the moneys actually received by the treasurer for the said county for the time being, on account of the last preceding rate, have been actually and duly expended, then and in such case, and so often as the same shall happen, the order for making any new rate shall contain a proviso or direction, that no moneys shall be collected or paid as hereinbefore mentioned, on account of such new rate, until three-fourths of the moneys so received as aforesaid, on account of the preceding rate, shall have been actually expended as aforesaid, and the said High Constable shall have been authorized as next hereinafter mentioned, to require payment of the moneys due on such new rate:" provided, that if three-fourths be expended in the interval between two general quarter sessions, the justices, at any adjournment, &c., on production of the former order, and on oath by the treasurer that the three-fourths are expended, may make an order authorizing payment and receipt of the rate; whereupon it shall be lawful for the High Constables to issue their warrants to churchwardens, &c., demanding payment of the rate; and the same shall be paid as if there had been no such proviso or restriction.

Sect. 16 enacts, "That if the churchwarden or churchwardens, overseer or overseers of the poor, or other inhabitant or inhabitants of any parish, township, or place, whether parochial or otherwise, where there is no churchwarden or overseer, or person appointed to act as such, shall at any time have reason to think that such parish, township, or place is aggrieved or injured by any rate or rates to be made under or by virtue of either of the said recited acts, or of this act, on the ground of any account of the said treasurer, or any part or parts of any such account, not having been audited, or having been unduly or improperly audited or allowed;" "or on the ground of three-fourths of any former rate or rates not having been duly expended previously to the making of any new rate or rates, or any other just or reasonable objection to such rate or rates," such churchwarden, &c., or the parish, &c., may appeal to the next general or general quarter sessions for the county, happening within the period in the act specified; and the justices shall, at such sessions, or at some sessions to which they may adjourn the appeal, "hear and determine the causes and matters" of such appeal, "and quash, alter, or amend the rate appealed against, or give such other relief in the premises as to them shall seem just and proper."

(a) *Regina v. St. George, Hanover Square*, November 14th and 17th, 1838.

Sir *J. Campbell*, Attorney-General, and *Prendergast*, now showed cause. To quash the rate now for want of a restrictive clause would answer no purpose. The observations on this point are omitted. But the magistrates, when applied to at the December sessions, had no authority to quash it, there being no continuances entered on the appeal; for that reason they refused; and the Court will not require parties by mandamus to do that which at the time of refusal they had not power to do. The local act sect. 16 enables the magistrates, on appeal, either to quash, to alter, or to amend the rate. Assuming that the Court would grant a mandamus to the justices to hear, it will not call on them by mandamus to do one particular judicial act among those which the statute leaves in their discretion, namely, to quash the rate. And this application would have been unnecessary if the parties making it had not been guilty of laches in omitting to bring the rate, as well as the order and special case, before this Court by certiorari, which, by stat. 12 G. 2, c. 29, they might have done. Besides, by sect. 18 of that statute, (a) if a rate is quashed on certiorari, provision is made for reimbursing those who may have paid more than a just assessment under such rate; and the same section protects persons who may have collected or received any money on a rate quashed by certiorari: but no such indemnity is given in either case, if the rate is quashed without a certiorari. The magistrates only desire the opinion of the Court, and are ready to do what shall be directed.

Bodkin and *Doane*, contra. As to the objection that the sessions, in last December, could not quash the rate, because continuances had not been entered, admitting that to be so, they might have entered continuances for the purpose of quashing, or at least this Court may now order them to do so. The appellants have no other remedy. It is contended that the Court will not order justices to do a particular judicial act; but here the persons opposing the application are not only justices but parties. [COLERIDGE, J. Why did not you bring up the rate by your certiorari?] The writ commanded the justices to send up the order of sessions with all things touching the same. They should have sent the rate. But, if they had, the case which was settled by the chairman did not offer this Court the option of quashing the rate. [Lord DENMAN, C. J. If the rate had appeared bad on the face of it, we might have done so.] The rate was not bad on the face of it; and at all events that suggestion could not be made now. [LITLEDAL, J. If the rate is quashed without certiorari, there is no protection for persons who have collected it.] The words of sect. 18 are, "quashed or discharged on any certiorari brought or to be brought in any of his Majesty's Courts of Record at Westminster, or otherwise, for any money," &c.

Lord DENMAN, C. J. I had hoped that the eighteenth section of stat.

(a) Stat. 12 G. 2, c. 29, (for the more easy assessing, collecting, and levying of county rates,) enacts, by s. 18, "That no action or suit shall be commenced or prosecuted against any person or persons who has or have been or shall be employed in the collecting or receiving any money in pursuance of the said recited acts, or this present act, on any rate or rates which has or have been or shall be quashed or discharged on any certiorari brought or to be brought in any of his Majesty's Courts of record at Westminster, or otherwise, for any money collected or received, or to be collected or received on any such rate or rates, before such writ of certiorari was or shall be brought and allowed; and that justice may be done to such persons who shall or may pay towards any rate which shall be quashed or discharged, the several sums of money which shall appear to have been paid by them on such rate, either in whole, or in part, more than they ought to have paid, shall be repaid, or allowed to them in the next rate or rates which shall be made in pursuance of this act, as if the same had been paid on such new rate or rates; anything in any former act," &c., to the contrary notwithstanding.

12 G. 2, c. 29, might be found to bear the application contended for on behalf of the appellants. But we cannot so construe it. The words are, that no action shall be brought against any person who shall have been employed in collecting or receiving any money, in pursuance of the act, on any rate which has been, or shall be, "quashed or discharged on any certiorari brought or to be brought in any of his Majesty's Courts of Record at Westminster, or otherwise, for any money collected or received," "on any such rate or rates, before such writ of certiorari was or shall be brought and allowed." The clause confines the exemption to cases where the quashing is the act of the Court: therefore by granting a mandamus we should expose persons who have taken part in the collecting of this rate to actions. Supposing that we could grant the mandamus as desired, or could adapt it to the case by altering the terms, I do not see that any benefit would result. If the parties had brought the rate as well as the order of sessions before us by certiorari we might have quashed the rate; but that was not done. The rule must be discharged.

LITLEDALE, J. We cannot grant the writ as prayed. This Court cannot dictate by mandamus the judgment which another court shall give. We might indeed refer it to them to consider what judgment they should pronounce; but I think that, under the circumstances, that cannot be done.

COLERIDGE, J. (a) No answer has been given to the objection that the sessions had not power to quash the rate when the application was made to them. And quashing a rate is a judicial act; we cannot dictate that another court shall perform it. Rule discharged.

On the same day of this term, January 17th, *Doane* obtained a rule calling on the justices of Middlesex to show cause why a certiorari should not issue, to bring up the accounts of the county treasurer from 2d July to 13th October, 1838, inclusive, the abstract of the said accounts, and the audit and examination of the same by the committee of justices of the county, the report of the result of the examination signed by six of the committee, dated 16th October last, the order of sessions made on 1st November last for the further audit and allowance of the said accounts, the supplemental account of the treasurer from 13th October to 1st November last, the order of sessions made on 1st November last for making and assessing a county rate of three farthings in the pound, the original rate, and the order of justices by which the quota of the parish of St. George Hanover Square was levied by warrant of distress, &c.

The affidavits in support of the rule contained statements to show that, upon reference to the documents mentioned in the rule, it would appear that the balance in the treasurer's hands exceeded one-fourth of the last preceding rate. The order for the rate, which was set out in the affidavits, recited that three-fourths of the moneys collected on account of the last preceding rate had been actually and duly expended; and it contained no proviso for suspending the payment. There were affidavits in answer. On a subsequent day of this term, January 30th,

Sir *J. Campbell*, Attorney-General, and *Prendergast* showed cause. The rate being good on the face of it, the Court cannot quash it upon affidavit. But, independently of this objection to the rule, the parties ought to have appealed to the quarter sessions. Sect. 16 of the local act gives an appeal expressly on the objection now made. No certiorari

(a) Williams, J., being a parishioner of St. George, Hanover Square, gave no judgment.

would be granted to bring up a rate on the ground of inequality, under the general acts, because the proper remedy in such case is appeal: here, therefore, where the remedy by appeal is enlarged, the remedy by certiorari is contracted to the same extent. *Rez v. The Mayor, &c., of Gloucester*, 5 T. R. 346, shows how far the Court will go in supporting rates which are, in their terms, legal.

Doane, contra. The general principle, of allowing no certiorari to bring up a rate where there is an appeal, applies only to the case of rates levied under the general law, and is therefore confined to cases of inequality, which is the only ground of appeal under that law. It is a rule that the writ of certiorari shall not be taken away except by express words: here the attempt is to take it away by an implication founded only on the extension of another remedy. It would be useless to appeal to the sessions on the ground of a supposed state of facts which they themselves have expressly negatived.

Lord DENMAN, C. J. The rate is admitted to be good on the face of it; and the power of appeal comprehends the very objection made upon affidavit. The certiorari cannot issue.

LITLEDALE, WILLIAMS, and COLERIDGE, Js., concurred.

Rule discharged.

AMOR against FEARON—p. 548.

If a clerk, retained at a salary to manage a mercantile business, declares that he is a partner, and will transact the business as such, the employer may immediately dismiss him. Although the party has not committed any other act of misconduct, nor refused, in terms, to go on as clerk.

ASSUMPSIT. The declaration stated that, in consideration that plaintiff would enter into defendant's service as a clerk and manager to superintend and conduct a business of defendant, to wit, the business of a dealer in wine and spirits at a certain establishment, &c., at a certain yearly salary, defendant promised plaintiff to retain and employ him in his service in the capacity aforesaid for one year from July 1st, 1831, and afterwards, as long as plaintiff and defendant should respectively please, until the end of the current year from July 1st, 1831. Averment, that plaintiff entered into the service and continued, &c., until and upon 6th November, 1832, and was then, and always had been, ready and willing, and then offered, to continue in the said service and employ of defendant in the capacity aforesaid and on the terms aforesaid until the end of the then current year; Breach, that defendant would not continue plaintiff in his employ, &c. until the expiration, &c.: but, during the current year, &c., refused to suffer him to continue, &c., and wrongfully dismissed him without any reasonable or probable cause, &c., whereby plaintiff lost the salary which he otherwise would have acquired, &c., and he and his family were put to inconvenience, &c. There were also indebitatus counts, for wages, &c., (a) and on an account stated.

Pleas. 1. To the first count, non assumpsit. 2. To the same count, that, after the making of the promise in that count mentioned, and just before and at the time of the dismissal, &c., to wit on, &c., plaintiff con-

(a) The plaintiff, by his particular, claimed, under these counts, wages from April 30th, 1832, to November 6th, 1832, the day of dismissal; and 20*l.* on a demand, not material here, for board.

ducted himself in such an improper, offensive, disobedient, and insolent manner that defendant was forced and obliged to dismiss plaintiff, and could not longer keep him in his service, and defendant was forced and obliged by such conduct of plaintiff to put an end to such service and employ; without this, that defendant then wrongfully dismissed and discharged plaintiff without any reasonable or probable cause in manner and form, &c. Conclusion to the country. 3. To the 2d and subsequent counts, payment into Court of 126*l.* 10*s.*

Replication, joining issue on the 1st and 2d pleas. To the 3d, damage ultra. Issue thereon.

On the trial before Lord DENMAN, C. J. at the sittings in London after Michaelmas term, 1838, the following facts appeared. The defendant was a wine and spirit merchant, carrying on business in Bond street. The plaintiff went into his service as a clerk, to manage the business at a yearly salary. He also, at certain periods, received a portion of the profits; but this, as the defendant alleged, was mere gratuity. A disagreement arising between plaintiff and defendant, the latter sent for one Henderson (who was called as a witness) and said to him, "I have sent to you to come to manage the business." In a conversation which then passed between plaintiff and defendant in Henderson's presence, the plaintiff said, "Have you any wish to see my solicitor?" The defendant answered, "No." The plaintiff then walked round the counter and said, "Then I go on with the business as usual." The defendant replied, "We will see about that;" and, going up to the plaintiff at the counter, desired him to leave the place. The plaintiff said, "When I am satisfied and paid what I require, I will leave." The solicitors of the respective parties came shortly afterwards, (having been sent for,) and the defendant's solicitor said to the plaintiff, "You claim to be a partner; that puts an end to your being here, and you must go." The plaintiff said, "My solicitor has been waiting for you." In a conversation which followed, the plaintiff's solicitor said to the defendant's, "You must feel that he is a partner." The defendant's solicitor answered, "No, he is not; I must discharge him." The plaintiff was thereupon dismissed. On the following day the plaintiff's solicitor wrote to the defendant: "I beg to give you notice on behalf of Mr. John Amor, that he is quite ready to resume his duties as a partner in the house in Bond street." The plaintiff afterwards filed a bill in equity against the defendant for an account: the bill was dismissed: and the plaintiff then brought the present action. The amount paid into Court was the plaintiff's salary at the rate of 200*l.* a year, down to the time of dismissal.

The Lord Chief Justice, in summing up, told the jury that the plaintiff did not now claim to be a partner; and that, as to the dismissal, the question now was, whether the defendant had reasonable and probable cause for it, in the plaintiff's misconduct in assuming to be a partner. After referring to the conversation deposed to by Henderson, his Lordship said that the dismissal appeared evidently to have been caused by the plaintiff's claim to be partner; and he stated, as his opinion, that if a servant claimed to overhaul his master's accounts, that would put an end to the relation of master and servant between them, and that such relation could not continue where the servant claimed to be a master. And he left it to the jury to say, whether the plaintiff had been dismissed for asserting that he was partner, and whether the claim made was a reasonable ground of dismissal. Verdict for the defendant.

Thesiger now moved for a new trial on the ground of misdirection. The Lord Chief Justice left that to the jury which he ought to have decided himself, namely, whether certain conduct was a reasonable cause of dismissal. And this was not reasonable cause. It may be conceded that if a servant claimed to overhaul his master's accounts, that would be an act of insolence justifying dismissal. So if he claimed to be master; such an act would be unequivocal. But here the course of transactions between the parties might have led the plaintiff to believe that he was a partner; and he merely intimated his opinion that he was so. He was guilty of no misconduct as a clerk, and of no disrespect to the defendant. If he had refused to do his duty as clerk, on the ground that he was partner, or had committed any act of insubordination, the dismissal would have been justified; but to decide so here would be going farther than any decision warrants. [Lord DENMAN, C. J. He never said that, if not admitted to be partner, he was willing to go on as clerk. LITTLEDALE, J. He only proposed to "go on with the business as usual."] The mere claim to be partner was no ground for a summary dismissal, unless accompanied by some insolence of conduct or other improper act. To warrant that proceeding there should be some moral misconduct, pecuniary or otherwise, wilful disobedience, or habitual neglect; *Callo v. Brouncker*, 4 Car. & P. 518, (19 E. C. L. R. 504.) [Lord DENMAN, C. J. That does not exclude a right of dismissal for claiming to be in a situation inconsistent with that of a servant.] *Atkin v. Acton*, 4 C. & P. 208, (19 E. C. L. R. 346;); *Spain v. Arnott*, 2 Stark. N. P. C. 256, (3 E. C. L. R. 339;); *Robinson v. Hindman*, 3 Esp. 235, and *Turner v. Robinson*, 5 B. & Ad. 789, (27 E. C. L. R. 190,) show the kind of misconduct necessary to justify an immediate dismissal. See also *Fillieul v. Armstrong*, 7 A. & E. 557, (34 E. C. L. R. 160;); *Ridgway v. The Hungerford Market Company*, 3 A. & E. 171, (30 E. C. L. R. 59,) is the case most nearly approaching to an authority for the defendant; but there an act of contumacy had been committed.

LITTLEDALE, J. The cases referred to were properly decided; but this differs from them. In those there was no question that the party was servant, and he had done something improper in that capacity. Here the plaintiff disclaimed being a servant: if the defendant had suffered him to go on in the employment after that, the nature of his situation might have been doubtful to those who dealt at the house, and the circumstances would have been evidence for a jury that the plaintiff really was a partner. Therefore the defendant was justified in dismissing him, and refusing to pay him wages from the time of dismissal.

WILLIAMS, J. The point which Mr. *Thesiger* says should have been decided by the Judge was a matter of fact. It rests on the facts of the particular case, whether the party has been guilty of a certain amount of disobedience or misconduct. Here, the jury were to determine, on the facts, whether or not the plaintiff intended to set himself up as a partner. If the jury understood that his conduct was an assumption of partnership, that was inconsistent with the plaintiff's being a servant.

COLERIDGE, J. The meaning of the plaintiff's verbal declarations, as explained by his solicitor's letter, was a question for the jury; and their inference from the facts must have been that the plaintiff's language was not a claim, civilly advanced, of right to be a partner, but an assertion of that right, so made as to justify the master in refusing, for his

own protection, to permit that he should continue doing those acts which he had been doing until that time. The servant had refused to be servant any longer. In the cases cited there was no dispute whether the party dismissed was servant or not. Here he had at once put himself in a situation inconsistent with that in respect of which he claims wages.

LORD DENMAN, C. J., concurred.

Rule refused.

DOE on the demise of DUNCAN against EDWARDS.—p. 554.

If a document be produced, under sect. 76 of the Insolvent Debtors' Act, stat. 7 G. 4, c. 57, with a seal purporting to be the seal of the Insolvent Debtors' Court, it is not necessary to prove that the seal is actually the seal of the Court.

THIS ejectment was tried before LORD DENMAN, C. J., at the London sittings after last term. The case on the part of the plaintiff was that the defendant was yearly tenant. A six months' notice having been served for Michaelmas, 1838, it was material to the plaintiff to prove that the tenancy began at Michaelmas, 1836. The defence was that the tenancy began at Christmas, 1836; and that the action, therefore, was brought too soon.

The plaintiff tendered a schedule delivered by the defendant as an insolvent debtor, of 1837, containing admissions which (as the plaintiff contended) fixed the commencement of the tenancy at Michaelmas. The copy of the schedule was produced, with a seal, purporting to be the seal of the Insolvent Debtors' Court: but no proof was offered that the seal really was that of the Court. Objection was made to the admission of the document without such proof: but the Lord Chief Justice thought it unnecessary, and admitted the document accordingly, directing a verdict for the lessor of the plaintiff.

Neale now moved for a new trial, on the ground that the document was not admissible without further proof. By stat. 7 G. 4, c. 57, s. 76, copies of the schedule and other proceedings, purporting to be signed by the officer, &c., "and sealed with the seal of the said Court," are to be admitted "without any proof whatever given of the same, further than that the same is sealed with the seal of the said Court." Here no such proof was given; and the document was admitted upon the mere fact that *some* seal was upon it. By the recent act, 1 & 2 Vict. c. 110, s. 105, it is enacted that copies of the proceedings shall be evidence, so far as this requisite is concerned, simply on their "purporting to be sealed with the seal of the said Court." This change in the language of the legislature shows their opinion that, under the previous act, it was not sufficient that the seal should *purport* to be the seal of the Court without further evidence.

LORD DENMAN, C. J. The principle recognised in practice seems to be that, when the seal purports to be that of the Court, we take notice that it is so. The provision of the recent act is expressed more distinctly than that of the preceding, merely to prevent mistakes.

LITLEDALE, J. I apprehend that it is not necessary to prove the seal.

WILLIAMS, J., concurred.

COLERIDGE, J. The seventy-sixth section of stat. 7 G. 4, c. 57, does not require proof of the seal of the Court, but only that the document in question is "sealed with the seal of the said Court."

Rule refused.

DOE on the demise of RICHARDSON against THOMAS and WILLIAMS.—p. 556.

Land which has been annexed to a perpetual curacy of a parish, by the Governors of Queen Anne's Bounty, under 2 stat. 1 G. 1, c. 10, ss. 4, 21, cannot be leased by the curate so as to bind the successor, if the patron only consent, and not the ordinary.

Though conveyed to the curate and his successors for ever, and allotted and applied by the Governors to the church, and annexed thereto, to go in succession with the church.

Quere, per Lord DENMAN, C. J., and WILLIAMS, J., whether such curate is one of the persons whose leases are made valid by stat. 32 H. 8, c. 28, s. 1.

Semble, per LITTLERDALE, J., he is. Per COLERIDGE, J., contra. Agreed by the Court that, if he be within sect. 1, he is within the restriction of sect. 4.

EJECTMENT for a farm and lands in the parish of Lambston, in Pembrokeshire. On the trial before Lord DENMAN, C. J., at the Pembrokeshire summer assizes, 1836, a verdict was found for the plaintiff, subject to the opinion of this Court upon the following case.

The parish of Little Newcastle, in Pembrokeshire, is a perpetual curacy, situated in the diocese of St. David's, and is subject to the visitation and jurisdiction of the bishop of that see.

By indenture of bargain and sale, duly enrolled, &c., dated 24th September, 1791, between William Summers of the first part, (who, before and at the time of the execution of the indenture, was seised in his demesne as of fee of and in the several lands, tenements, and hereditaments, in the indenture mentioned to be by him granted, bargained, sold, and confirmed,) the governors of the bounty of Queen Anne for the augmentation of the maintenance of the poor clergy, of the second part, and the Rev. James Rees, clerk, curate of the curacy of Little Newcastle, of the third part, after reciting (amongst other things) that, in 1787, the governors did agree to augment the said curacy a third time, by lot, with the further sum of 200*l.*, out of their revenue, and had ordered the same to be in like manner laid out in a purchase of lands, tithes, or other hereditaments, to be settled for the further perpetual augmentation of the said curacy, according to the rules and orders made and established by letters patent under the great seal, and in pursuance of the trust in the said governors reposed for the distribution of the said bounty; and that the messuage or dwelling-house, closes, or parcels of lands and hereditaments, after described, had, upon due inquiry and examination into the value and other circumstances thereof, been found and approved of by the said governors to be convenient for the further perpetual augmentation of the curacy aforesaid, and of the value of 200*l.*, which was the sum agreed upon for the purchase of the same; it was witnessed that, in consideration of 200*l.* to the said W. Summers paid by the said governors, and in consideration of 5*s.* to the said William Summers paid by the said James Rees, the said William Summers, with the approbation and direction of the governors, testified by their common seal being thereunto affixed, did grant, bargain, sell, and confirm unto the said James Rees and his successors, curates of the curacy of Little Newcastle aforesaid, all that messuage, dwelling-house, and garden, with the

appurtenances, situate, &c., in the parish of Lambston, &c.; and also all those two closes, &c., in the parish of Lambston, to hold the said premises unto, and to and for the only use and behoof of, the said James Rees and his successors, curates of the curacy of Little Newcastle aforesaid, for ever, for the further perpetual augmentation of the said curacy: and reciting, further, that the said messuage or dwelling-house, closes, &c., so purchased and thereinbefore granted, did arise from and out of the bounty granted by Queen Anne, and had been purchased with the sum of 200*l.* arising from the said bounty. The said governors, by virtue and in pursuance of the last clause in an act, &c., (2 stat. 1 G. 1, c. 10,) did thereby allot and apply to the church or chapel of Little Newcastle aforesaid all and singular the said messuage or dwelling-house, closes, &c., with the appurtenances, and did thereby declare that the same should for ever thereafter be annexed to the said church or chapel of Little Newcastle, and should be from thenceforth held and enjoyed, and go in succession, with such church or chapel, for ever.

The several hereditaments and premises in the said indenture mentioned to be granted, &c., by William Summers, were the premises for which the present ejectment was brought.

In 1800, and at the date of the lease next after mentioned, the said James Rees was still the curate of Little Newcastle: and his brother John Rees Stokes was then the patron and impropiator of the same curacy.

By indenture, dated 15th January, 1800, between the said James Rees, therein described as the curate of the perpetual curacy of Little Newcastle, of the first part, the said John Rees Stokes, therein described as the patron and impropiator of the same curacy and parish church, of the second part, and David Evans of the parish of Lambston, in the county of Pembroke aforesaid, yeoman, of the third part, James Rees, in consideration of the yearly rent, &c., did demise, grant, lease, set, and to farm let, and the said John Rees Stokes, for himself, his heirs and assigns, for the consideration aforesaid, did grant, ratify, and confirm, unto David Evans, the several hereditaments and premises described and comprised in the said indenture of bargain and sale; to hold the same unto the said David Evans, his heirs, executors, administrators, and assigns, from 29th September, then last past, for the natural lives of him the said David Evans, and two others, and the life of the survivor, yielding and paying therefore yearly, during the said term, unto the said James Rees, during his incumbency, and, after, unto the said John Rees Stokes, his heirs or assigns, or unto the person or persons who for the time being should be entitled thereto, the yearly rent of 9*l.* 9*s.*

The lands, tenements, and hereditaments included in the said lease were lands which had been most commonly letten to farm, and occupied by the farmers thereof, by the space of twenty years next before such lease was made thereof; and the yearly rent, so reserved upon the said lease as aforesaid, was as much yearly rent or sum as had been most accustomedly yielded or paid for the same lands, &c., within twenty years next before such lease thereof was made.

James Rees died on 28th September, 1835; and, from the date and execution of the said lease and up to his death, still continued the curate of the perpetual curacy of Little Newcastle; and, as such curate, was, up to and at his death, in the receipt of the rent and duties reserved in the lease.

After the death of James Rees, vtz., on 29th September, 1835, Peter Davies Richardson, the lessor of the plaintiff, was presented to the curacy, and was afterwards, viz., on 13th October, 1835, duly instituted and inducted into the curacy, and has ever since continued, and still is, the perpetual curate thereof.

One of the persons for whose lives the said lease was granted is still living. The case then explained that the defendants claimed under David Evans, and were now in possession of the premises.

The question for the opinion of the Court was, whether James Rees and John Rees Stokes, or either of them, had any power to grant the said lease for the term of lives therein stated, without the confirmation of the ordinary of the diocese.

E. V. Williams, for the plaintiff. The question is, whether a perpetual curate can let lands annexed to his curacy by the governors of Queen Anne's bounty without the confirmation of the ordinary. The patron here has confirmed; but the ordinary has not. In 2 Burn's Ecclesiastical Law, 55 (8th ed., Tyrwhitt), tit. *Curates*, the following account of the nature of a perpetual curacy is given. "The origin of perpetual curacies was thus: By the statute of the 4 H. 4, c. 12, it is enacted, that in every church appropriated there shall be a secular person ordained vicar perpetual, canonically instituted and inducted, and covenantably endowed by the discretion of the ordinary. But if the benefice was given *ad mensam monachorum*, and so not appropriated in the common form, but granted by way of union *pleno jure*; in that case it was served by a temporary curate belonging to their own house, and sent out as occasion required. The like liberty, of not appointing a perpetual vicar, was sometimes granted by dispensation, in benefices not annexed to their tables, in consideration of the poverty of the house, or the nearness of the church. But when such appropriations, together with the charge of providing for the cure, were transferred (after the dissolution of the religious houses) from spiritual societies to single lay persons, who were not capable of serving them by themselves, and who by consequence were obliged to nominate some particular person to the ordinary for his license to serve the cure; the curates by this means became so far perpetual, as not to be wholly at the pleasure of the appropriator, nor removable but by due revocation of the license of the ordinary." And 2 Gibson's Codex, 819 (2d ed.) is cited. Now, until the curacy was augmented by Queen Anne's bounty, it possessed, properly speaking, no endowment: there was only a stipend from the appropriator. By 2 stat. 1 G. 1, c. 10, s. 4, it is recited that Queen Anne's bounty "was intended to extend, not only to parsons and vicars who come in by presentation, or collation, institution, and induction, but likewise to such ministers who come in by donation, or are only stipendiary preachers or curates, officiating in any church or chapel where the liturgy and rites of the church of England, as now by law established, are and shall be used and observed, most of which are not corporations, nor have a legal succession, and therefore are incapable of taking a grant or conveyance of such perpetual augmentation as is agreeable" to the intention of the late Queen; and it is enacted "that all such churches, curacies, or chapels, which shall at any time hereafter be augmented by the governors of the bounty of Queen Anne for the augmentation of the maintenance of the poor clergy, shall be, and are hereby declared and established to be, from the time of such augmentations, perpetual cures and benefices, and the ministers duly nominated

and licensed thereunto, and their successors respectively, shall be, and be esteemed in law, bodies politic and corporate, and shall have perpetual succession by such name and names as in the grant of such augmentation shall be mentioned, and shall have a legal capacity, and are hereby enabled to take, in perpetuity, to them and their successors, all such lands, tenements, tithes, and hereditaments, as shall be granted unto or purchased for them respectively by the said governors of the bounty of Queen Anne for the augmentation of the maintenance of the poor clergy." By sect. 21 it is enacted that, if the governors "shall by any deed or instrument in writing under their common seal, allot or apply to any church or chapel, any lands, tithes, or hereditaments, arising from the said bounty," &c., "and shall declare, that the same shall be for ever annexed to such church or chapel, then such lands, tithes, and hereditaments, shall from thenceforth be held and enjoyed, and go in succession with such church and chapel for ever." These provisions make the perpetual curate a corporation, capable of taking in perpetuity to him and his successors; but that does not give a right to lease beyond the life of the lessor, nor does it bring the curate within the enabling clause, sect. 1 of stat. 32 H. 8, c. 28: and if it would, then the proviso in sect. 4 of that statute applies, and takes away the ability.

First, at common law the right of the perpetual curate cannot be larger than the common law right of a parson or vicar was. Littleton, sect. 644, says, "*Nota quod dictum fuit pro lege*, in a writ of account brought by a master of a college against a chaplain, that if a parson, or vicar, grant certain land which is of the right of his church to another and die, or changeth, the successor may enter, &c. And I take the cause to be, for that the parson, or vicar, that is seised, &c., as in right of his church, hath no right of the fee-simple in the tenements, but the right of the fee-simple abideth in another person; and for this cause his successor may well enter, notwithstanding such alienation," &c. In sect. 645, he adds, "For a bishop may have a writ of right of the tenements of the right of his church, for that the right is in his chapter, and the fee-simple abideth in him and in his chapter. And a dean may have a writ of right, because the right remains in him. And an abbot may have a writ of right, for that the right remains in him and in his convent. And a master of an hospital may have a writ of right, because the right remaineth in him and in his confreres, &c. And so of other like cases. But a parson or vicar cannot have a writ of right, &c. And in sect. 646, "But the highest writ that they can have is the writ of *juris utrum*, which is a great proof that the right of fee is not in them, nor in any others, &c. But the right of the fee-simple is in abeyance." The *juris utrum* was commonly termed the parson's writ of right. Littleton adds, in sect. 648, "Also, some per-adventure will argue and say, that inasmuch as a parson, with the assent of the patron and ordinary, may grant a rent-charge out of the glebe of the parsonage in fee, and so charge the glebe of the parsonage perpetually, *ergo* they have a fee-simple, or two or one of them have a fee-simple at the least. To this may be answered, that it is a principle in law, that of every land there is a fee-simple, &c., in somebody, or otherwise the fee-simple is in abeyance. And there is another principle, that every land of fee-simple may be charged with a rent-charge in fee by one way or other. And when such rent is granted by the deed of the parson, and the patron, and ordinary, &c., in fee, none shall have pre-

judice or loss by force of such grant, but the grantors in their lives, and the heirs of the patron, and the successors of the ordinary after their decease. And after such charge, if the parson die, his successor cannot come to the said church to be parson of the same by the law, but by the presentment of the patron, and admission and institution of the ordinary. And for this cause the successor ought to hold himself content, and agree to that which his patron and the ordinary have lawfully done before, &c. But this is no proof that the fee-simple, &c., is in the patron and the ordinary, or in either of them, &c. But the cause that such grant of rent-charge is good, is, for that they who have the interest, &c., in the said church, viz., the patron according to the law temporal, and the ordinary according to the law spiritual, were assenting, or parties to such charge," &c. It is therefore clear that the parson and patron had not, between them, the whole fee. Lord Coke's commentary, 341 a, &c., confirms this view. In Butler's note (B) to Litt. s. 644, above cited, it is suggested that the text of that section, when truly read, affirms that the fee simple is in no one, but in abeyance. Fearne, Cont. Rem. ch. 6, s. 3, appears to question the correctness of such a doctrine. It is, however, adopted in 2 Blackst. Com. 107, where it is said that the parson of a church "hath only an estate therein for the term of his life; and the inheritance remains in abeyance." Mr. Justice COLERIDGE, in his note (2) on this passage, inclines to Fearne's opinion; and considers that the inheritance remains in the grantor. But, whichever view be adopted, the fee-simple is not in the parson, or patron, nor in the two together.

Next, the lease is not warranted by the enabling statute 32 H. 8, c. 28. Sect. 1 enacts that leases, under seal, of lands, &c., by persons of full age, "having any estate of inheritance either in fee-simple or in fee-tail, in their own right, or in the right of their churches," &c., shall be as effectual against the lessors, &c., as if they had been seised "of a good, perfect" and pure estate of fee-simple of such lands "to their own only uses." The passages already cited from Littleton and Coke, to which may be added Co. Lit. 300 b, show that this applies, not to parsons, who have no inheritance, but to bishops, deans, abbots, and the like, who may maintain a writ of right, having in them the whole estate. At common law, and before the disabling statutes, a corporation aggregate might alien like an individual; but a corporation sole requires confirmation by those *quorum interest*. Sect. 4 of stat. 32 H. 8, c. 28, provides that the act shall not "extend to give any liberty or power to any parson or vicar of any church or vicarage, for to make any lease or grant of any of their messuages, lands, tenements, tithes, profits, or hereditaments belonging to their churches or vicarages, otherwise or in any other manner than they should or might have done before the making of this act." It will perhaps be contended that this clause shows that parsons and vicars would have been within the enacting part of the statute, if this proviso had not been inserted, for that otherwise its insertion would have been unnecessary; and that a perpetual curate will therefore be within the enacting part, as having an estate similar to that of the parson or vicar, but not within the proviso, inasmuch as he is neither parson nor vicar. However that might have been, if sect. 4 had been in the form of an exception, the argument fails when, as here, the proviso merely declares that the act shall not "extend" to the cases mentioned. If it be said that 2 stat. 1 G. 1, c. 10, s. 4, brings the perpetual curate within the language of the enacting part of stat. 32 H.

8, c. 28, the answer is that it puts him only on a footing with a parson or vicar, for the land is in "the parson and his successors," Co. Litt. 341 a. In *Acton and Pitcher's Case*, 4 Leon. 51, it was held that a prebendary is within the equity of stat. 32 H. 8, c. 28, s. 1, though he be seised in right of his prebend, not his church. *Watkinson v. Man*, Cro. Eliz. 350, is to the same effect. And in *Bis v. Holte*, 1 Sid. 158, (a) this was assumed. But in Levinz's report of the last case it is added, "But see 1 Inst. 300 b, where a prebendary is taken as a parson or vicar, not to have the whole fee in him." In all these cases, the question discussed was, whether the prebendary held in right of his church or his prebend; and, if the latter, whether he was within the equity of the statute: but the question, whether it was an "inheritance" or not, seems not to have been argued. Further, as a perpetual curate was not beneficed at the time of passing stat. 32 H. 8, c. 28, he is not within the equity of the act. In *Bisco v. Holte*, 1 Lev. 112, "Hyde said, that precentors of old foundations are enabled by the statute, but otherwise perhaps of new foundations." The object of stat. 32 H. 8, c. 28, as appears by the recital, was to protect lessees of terms from the hardships which they suffered from the avoidance of their terms; and limitations were laid down, on the other hand, protecting the church. The meaning of statutes must be gathered, not so much from particular words, as from the occasion on which the words are used, and the object of the act: *Stradling v. Morgan*, Plowd. 205, (b) ABBOTT, C. J., in *Rez v. Hall*, 1 B. & C. 136, (8 E. C. L. R.) Here the limitation would be totally destroyed by extending the statute to the present case. And, if the case be within the analogy of the then existing ones of parsons and vicars, it is also within the analogy of sect. 4 of stat. 32 H. 8, c. 28, and the proviso applies. In this view, the curate would be parson, as being he who "personam ecclesiæ gerit;" Co. Lit. 300 b. In 3 Salk. 377, there is a reference to the Year Book of 40 Ed. 3, c. 29, 30, (c) whence it seems that so early as the reign of Edward III. the word *parson* was applied to a vicar. It is true that in *Jenkinson v. Thomas*, 4 T. R. 665, it was held that a curate whose curacy was augmented by Queen Anne's bounty was not within the penalties, stat. 21 H. 8, c. 13, s. 26, for non-residence, not being "beneficed with any parsonage or vicarage." That, however, was on the construction of a penal act. It seems that the parties obtaining the confirmation here have confounded the case with that of a donative, where the patron is *in loco episcopi*.

Further, the augmentation here took place in 1791; the lease was granted in 1800. Now, by sect. 2 of stat. 32 H. 8, c. 28, the lease can be only of lands most commonly letten to farm or occupied by the farmers thereof, for twenty years next before the lease made. But how can that be satisfied here? The provision cannot refer to cases of letting by other than the ecclesiastical persons, &c., to whom the act refers. The ground of the limitation, as it regards ecclesiastical persons, was, that one incumbent might be trusted with letting what another incumbent had let before; not what any previous owner had chosen to let. Could a perpetual curate let a house granted, for residence, by the governors, because it had been let before? That would often defeat the

(a) S. C., as *Bill v. Holt*, 1 Keb. 576. S. C., as *Bisco v. Holte*, 1 Lev. 112.

(b) See argument in *Adam v. The Inhabitants of Bristol*, 2 A. & E. 895, 896, (29 E. C. L. R.)

(c) Yearb. Trin. 40 Ed. 3, f. 27 B, c. 5.

object of the augmentation. The same line of argument applies to the amount of rent. And this principle appears to be confirmed by the instances given in 4 Bac. Abr. 712, 7th edit., *Leases and terms for years* (E.) 2 Rule 6. *Doe dem. Tennyson v. Lord Yarborough*, 1 Bing. 24, (8 E. C. L. R.,) shows that, where there has been no letting before, the lands cannot be let, even though previously waste.

Chilton, contra. The last argument would show that a tenant in tail could not, under stat. 32 H. 8, c. 28, let lands which his father had purchased, a year before, from the owner of the fee-simple, though they had been let for any length of time. The language of sect. 1 of stat. 32 H. 8, c. 28, would clearly have included parsons and vicars, had they not been excepted by sect. 4. Then 2 stat. 1 G. 1, c. 10, s. 4, puts perpetual curates, as to the augmentation, on the footing on which parsons and vicars were before the act. And therefore the enacting section of the former statute applies to perpetual curates, they not being excepted. The cases cited, as to the right of a prebendary to let, all proceed on the ground that he has an estate sufficient, if it be in right of his church: the assumption applies precisely to the case of a perpetual curate, though the difficulty does not. In *Ensden and Denny's Case*, Palm. 104, (a) the power of a precentor or prebendary to let is put on the footing that he is within the analogy of a parson or vicar in stat. 32 H. 8, c. 28, but not within the exception in sect. 4. That applies precisely here. The fee-simple must be in the curate, or the curate and patron: for the grantor has, as the case shows, parted with his whole estate. Lord COKE does not appear to have formed a decided opinion as to the nature of the estate of the parson. In Co. Litt. 44 a, he attributes the disabling acts there cited to the power of parsons, among others, to let. In Co. Litt. 8 b, he says that the parson, vicar, &c., takes an inheritance by the words "to him and his successors." In Co. Litt. 44 b, the inability of the parson or vicar to lease is referred solely to the exception in sect. 4 of stat. 32 H. 8, c. 28. In Co. Litt. 67 a, it is said that parson or vicar hath a qualified fee, and to many intents but an estate for life, so that he can neither receive nor do homage. His meaning in this passage (which, however, seems inconsistent with Co. Litt. 341 b) is explained by the passage at 300 b, where "parson, prebend, vicar," are treated as having similar powers: and they are said not to have the absolute fee in them, "for to their grants the patron must give his consent." And in 341 b, the parson or vicar is said to have a fee-simple qualified, to be capable of receiving homage, (which a tenant for life is not,) and of maintaining certain writs which none can maintain but a tenant in fee-simple or fee-tail. In 1 Gibson's Codex, 732, (2d ed.,) tit. 31, c. 2, note c, it is said that "parsons and vicars being specially excepted in sect. 4, it follows that all *other sole corporations are included*, and are hereby enabled to bind their successors. Accordingly, it hath been adjudged, on several occasions, that *præcentors, chancellors, treasurers, and prebendaries*, of churches, are all within the benefit of this statute." It may be argued that the right of the prebendary rests on his superior dignity; but the dignity does not appear to be much superior to that of a perpetual curate. In 1 Gibson's Codex, 172, (2d ed.,) tit. 8, c. 2, note b, it is said, "*præbenda dicitur à præbendo, quia præberet auxilium episcopo*, saith my Lord COKE, which leaves no distinction between a *canonry* and a *prebend*: whereas, in truth, the first is a name of *office*, and the second only of *maintenance*;

(a) See Hale in note (8) to Hargrave's Co. Lit. 44, b.

and a *prebendary* was so called, not from the assistance he afforded to the *bishop*, but from the assistance the church afforded *him*, in meat, drink, and other necessities. And, therefore, in one of the councils abroad, we find it called *præbenda canonicalis, quæ consistit in pane, et vino, et quibusdam aliis*." It is added, (citing Lyndwood,) "*nascitur ex canoniâ, tanquam filia à matre*." *Jenkinson v. Thomas*, 4 T. R. 665, clearly shows that the proviso in sect. 4 of stat. 32 H. 8, c. 28, does not apply to a perpetual curate. In the note (c) to 2 Burn. Ecc. L. 55, (Curates,) 8th ed., it is said, "A perpetual curacy is not an ecclesiastical benefice, but is tenable with any other benefice, *Weldon v. Green*, 1772, adjudged by Sir GEO. HAY, in a suit by the patron against his clerk incumbent, who had accepted such a curacy after his institution and induction into the benefice, which this suit was intended to make void: as, by the ecclesiastical law, the acceptance of any ecclesiastical benefice, of ever so small value, without a dispensation, makes any former ecclesiastical benefice void. *Communicated to the late Mr. Serjeant Hill by Dr. Scott, now Lord Stowell*." And the language of stat. 17 C. 2, c. 3, s. 7, shows that the words *parsons* and *vicars* do not comprehend *perpetual curates*. [LITTLEDALE, J. You say that stat. 32 H. 8, c. 28, s. 1, applies, because the curate is seised of an inheritance in right of his church: but does the statute mean other than a parish church?] The case finds that this is a parish church. [COLERIDGE, J. The statement that a perpetual curacy exists assumes that there is a church and rector. LITTLEDALE, J. In Com. Dig., tit. *Ecclesiastical Persons*, among persons secular, we find seculars, archdeacons, parsons, and vicars: a curate seems to be a subordinate kind of person. Is he more than a subordinate or secondary vicar?] However that may be, 2 stat. 1 G. 1, c. 10, ss. 4, 21, brings the office within the enactment of stat. 32 H. 8, c. 28, s. 1.

E. V. Williams, in reply. Whatever varieties of expression Lord COKE may have used in designating the estate of the parson or vicar, it is clear (as, for example, from Co. Lit. 341 a, that he considered that he had not the power so to act as to prejudice his successor. But the lease here would prejudice the successor. *Ensden and Denny's Case*, Palm. 104, merely follows *Watkinson v. Man*, Cro. Eliz. 350, which again only follows *Acton and Pitcher's Case*, 4 Leon. 51. Even if the perpetual curate be seised in fee, it is not in right of the church: the whole church belongs to the impropiator. [COLERIDGE, J. Has a bishop any thing in a cathedral? Yet he clearly is within stat. 32 H. 8, c. 28, s. 1.] The statute cannot have meant to annex the power of leasing to such an estate as that of a perpetual curate.

LORD DENMAN, C. J. I doubt much whether the perpetual curate has any fee-simple at all; and, if he has not, he is not within stat. 32 H. 8, c. 28, s. 1. Next, even if he has, I doubt whether it be in right of the church: for he gets his fee, if at all, by force of 2 stat. 1 G. 1, c. 10, ss. 4, 21. But, if he has a fee-simple in right of the church, does he not fall within sect. 4 of stat. 32 H. 8, c. 28? It is said that the act did not contemplate the case of land given to the perpetual curate in succession; if it had, it would have included the case in sect. 4. But, if the estate can be brought within sect. 1, can we not also bring it within sect. 4? The curate is not the rector; he has not the great tithes; nor can he be called the parson, which implies a peculiar character. But he appears to be a vicar: for he serves the church in that capacity. *Jenkinson v. Thomas* certainly seems opposed to this view:

but the Court was there construing a penal statute. The clause in the present case must receive a more liberal construction. I am therefore of opinion that, if a perpetual curate be within sect. 1 of stat. 32 H. 8, c. 28, he is also within sect. 4. His power is, therefore, no more than it would have been before that statute; and the lease is void as against the successor for want of the ordinary's consent.

LITLEDALE, J. In answer to my doubt, whether the perpetual curate could be said to have any land in right of the parish church, it was urged that the case so stated the fact. It is true that the messuages and lands are allotted and applied to the church or chapel of the parish; and the patron and impropriator of the curacy and parish church are also spoken of in the lease, as well as the perpetual curacy of the parish. Yet the documents speak of the curate and curacy throughout; and the grant is to the curate and his successors. Now, has the curate the land in right of the church? If not, there is an end of the question, though he have a fee. As to this last point, I think it makes no difference whether he has a fee-simple, or only something in the nature of a fee-simple. To all intents and purposes, his estate resembles that of an archbishop, who can no more sell than a parson. The curate has not the land to him and his heirs; but he has it to him and his successors; I think, therefore, that he has, within the meaning of the statute, an estate in the nature of a fee-simple. But has he it in right of his church? Clearly, at the time of passing stat. 32 H. 8, c. 28, he had no land in such a right. Then has he it in that right, under 2 stat. 1 G. 1, c. 10? There may be a difficulty as to the meaning of the word *church*, in sect. 1 of stat. 32 H. 8, c. 28, whether it mean the actual parish church, or the church generally speaking; as a bishop holds, not in right of this or that particular church, but still of the church generally. I admit, on the whole, that the curate may be said to be seised in fee-simple in right of his church. But then, is he within sect. 4 of stat. 32 H. 8, c. 28? He is not vicar by name: but is he so in effect? I think he is something less. A vicar is one who is substituted for the rector, to serve the church, the tithes being in the hands of a lay rector. The perpetual curate, who in fact stands in the place of the vicar, cannot be more than a vicar. If, therefore, the perpetual curate be brought within the equity of sect. 1 of stat. 32 H. 8, c. 28, I think he is also brought within that of sect. 4.

WILLIAMS, J. It is clear, from what has been conceded, that there is no ground for contending that a perpetual curate was within stat. 32 H. 8, c. 28, s. 1, before the passing of 2 stat. 1 G. 1, c. 10. Till then, he was a mere stipendiary performing the clerical duties of the church. Then, the whole question is, whether 2 stat. 1 G. 1, c. 10, gives the perpetual curate a fee in right of his church. That would be saying a great deal, and more, probably, than would be consistent with the claims of the patron and the lay impropriator. Vicars are mentioned by name in stat. 32 H. 8, c. 28, s. 4. When we consider the origin of perpetual curates and vicars, it seems that either the curates come within the denomination of vicars or do not come at all within the enabling words of sect. 1. There can be no doubt that they do come within the general intent of the disabling clause, sect. 4, although, in a question upon enforcing a penalty, (a) it was held that they were distinct from vicars or parsons. This is a case not contemplated at the time of passing stat. 32 H. 8, c. 28; and, by holding that the curate, if brought within sect. 1,

(a) *Jenkinson v. Thomas*, 4 T. R. 665.

is also brought within sect. 4, we are only carrying into effect the meaning of the legislature.

COLERIDGE, J.—I agree that judgment must be given for the plaintiff. It follows naturally from the course of the argument that we should come to our conclusions on grounds somewhat different; since it is contended that the curate is not within sect. 1 of stat. 32 H. 8, c. 28, and also that, if he be, he is within sect. 4. My opinion is, that he is not within sect. 1. It is admitted that, when the statute passed, a perpetual curate was not within it. That being clear, and the law being still so with respect to every perpetual curate who is not brought within the section by a subsequent statute, we should clearly see our way before we say that any perpetual curate is now within it. Whether the perpetual curate here has a fee-simple, is a very difficult and disputable point; but it is not necessary for me to decide that. For, whether he have a fee-simple or not, he has it not in right of his church. I do not think that 2 stat. 1 G. 1, c. 10, alters the estate or interest of a perpetual curate: it merely turns the land into a benefice, and makes the endowment indefeasible. But it does not extend the parochial domain: if the land was not held in right of the church before, it is not so now. As there is a curate, there must, of course, be a lay rector; the repair of the church, and other analogous duties, devolve on him. The history of the office of perpetual curate shows that he was a kind of vicar performing ministerial duties, and nothing more. His estate is not altered; and, whether or not he holds in fee, he has no inheritance in right of his church. I need not consider sect. 4 of stat. 32 H. 8, c. 28; but I agree that a perpetual curate, if brought within sect. 1, can be so only by a course of reasoning which would bring him within sect. 4. He could be within sect. 1 only as standing in the place of the vicar: if he does so stand, it is difficult to say that he is not within sect. 4. That would lead to the same conclusion as we now arrive at. Nothing that we have said contravenes *Jenkinson v. Thomas*, which was on the construction of a penal statute. It is too late now to say that the same rules of construction are to be applied to penal statutes as to others.

Judgment for plaintiff.

REEVES and Another against M'GREGOR and Another.—p. 576.

A cause and all matters in difference, including an equity suit, were referred to arbitration, with power to the arbitrator to direct such verdict as he thought proper, and to determine what should be done by either party touching the matters in dispute. The costs of the cause and equity suit were to abide the event of the award; the costs of the reference and award to be in the arbitrator's discretion. The bill in equity, filed by the defendants in the action against the plaintiffs, prayed, among other things, an injunction against further proceeding in the action. The arbitrator directed that a verdict should be entered for the plaintiffs at law, with damages, on some issues in the cause, and for the defendants on the others; but he ordered that no execution should be taken out by the plaintiffs; and that, after entering of the verdict as above, and any judgment thereon, all proceedings on the judgment by either party to the action should be stayed. But for such direction the verdict would have entitled the plaintiffs to the general costs. He also directed that the suit in equity should cease.

Held no excess of the arbitrator's authority.

COVENANT on an indenture of lease. Six issues were joined. The cause coming on for trial at the Croydon Summer assizes, 1836, a verdict was taken for the plaintiffs, subject to a reference of the cause and all matters in difference, including a suit in equity, between the parties, to a barrister, who was empowered to order a verdict to be entered for the plaintiffs or defendants, and to order and determine what

he should think fit to be done by either party respecting the matters in dispute. The order of nisi prius directed that the costs of the cause, and of the suit in equity, should abide the event of the award; the costs of the reference and award to be in the arbitrator's discretion.

The award recited that the suit in equity was brought by the defendants in the action at law against the plaintiffs therein, who had put in their answer; that the defendants at law, by their bill in equity, after alleging that the plaintiffs at law had commenced an action against them (being the cause now referred) for supposed breaches of covenants in the above-mentioned lease, prayed that the plaintiffs at law might be ordered by decree to license certain alterations in the demised premises, or might be restrained by injunction from bringing any action against the defendants at law in respect of such alterations, and, in the mean time, from proceeding in the present action, or commencing any other in respect of the matters therein complained of. The arbitrator then stated certain other matters in difference between the parties: and he proceeded to award, as to the action at law, that the verdict should stand for the plaintiffs, with reduced damages, on three of the issues joined, and for the defendants on the other three: and, as to the suit in equity, he awarded that the defendants at law were not entitled to the license prayed, nor to any relief in respect of the matters involved in the issues found for them by the award; but, as to the other issues, he awarded as follows.

"I do find, adjudge," &c., "that the plaintiffs in equity were and are entitled in equity to be protected from and against the damages and the costs of the plaintiffs at law in respect of the verdict so ordered to stand for them at law on the three issues so found for the said plaintiffs at law; and that the said plaintiffs in equity were and are entitled to be relieved from and protected against any other or further action at the suit of the said plaintiffs at law in respect of the alterations involved in the issues found for the plaintiffs at law; but, subject to this, that the costs and expenses incurred in the said suit in equity, and in the said action at law, should be borne and sustained by the respective parties to the said suit and action by whom the same have been incurred. And, inasmuch as by the said order of reference I am authorised and empowered to order and determine what I shall think fit to be done by either of the said parties respecting the matters in dispute, I do accordingly order, determine, and direct that the said suit in equity be no further prosecuted, but that the same be wholly put an end to and determined, and that no further proceedings be had therein, save as herein-after mentioned. And I do award," &c., "that no execution or executions or other proceeding whatever be taken by the said plaintiffs at law upon any judgment which may be entered up by or for them upon the said verdict so directed to stand for them as to certain of the issues at law, to enforce either the damages by that verdict assessed, or the costs at law consequent thereon. And I do award," &c., "that, after the entering of the verdict so before awarded, and any judgment that may be entered and signed thereon, all proceedings on the said judgment by any or either of the said parties to the said action be wholly and for ever stayed and put an end to. And I do award," &c., "that no further or other action be brought by the said plaintiffs at law against the said defendants at law in respect of the said alterations so made as in the pleadings of the said action at law and suit in equity

respectively mentioned. And I do further award," &c., "with respect to the said suit in equity, that the said plaintiffs in equity do and shall cause their own bill to be dismissed, but without costs; and that the said defendants in equity do and shall, if necessary, appear and consent that the said bill be so dismissed without costs."

The arbitrator then proceeded to award specially as to the other matters in difference, deciding some points in favour of the plaintiffs at law, and others in favour of the defendants.

A rule nisi was obtained, in Michaelmas term, 1837, for setting aside the award, so far as related to the plaintiffs at law not proceeding to recover the costs of the issues found for them, the damages on those issues, and the general costs of the cause, and also the costs of the suit in equity, on the ground that the arbitrator had in those respects exceeded the power conferred on him by the submission, and made his award inconsistent therewith, and with the other parts of the award.

Cresswell and *Joseph Addison* now showed cause. If nothing but the action at law had been in question, the plaintiffs, on the arbitrator's finding as to that action, would have been entitled to the general costs of the cause, and those of the three issues found for them. But the costs are to abide the event of the whole award. The arbitrator's duty was to give such relief in the equity suit as he thought just, and as a court of equity would have granted. Had he omitted to determine on the prayer for an injunction, the award would not have decided all the matters referred. The whole event is, that the plaintiffs at law have a verdict on three issues, without power to issue execution for costs. They are legitimately deprived of costs, by the event of the award. There is indeed a clause intimating that the parties to the action and equity suit should bear their own costs thereof respectively: but that is not a direct adjudication; it is rather in the nature of a recital.

Platt and *Petersdorff*, contra. The intention of the parties referring clearly was, that the arbitrator should have no discretionary power over any of the costs, except those of the reference and award, which are expressly distinguished from the others by the order of nisi prius. It is contended that the event means the event of the whole award; but the construction must be distributive; that the costs of each suit shall follow the event, as it regards that suit. The event, here, as to the action at law, would entitle the plaintiffs to costs. If the event were to be regarded as to all the matters referred, there is no general result of the award which could decide the question of costs; for the determination of the equity suit is not wholly in favour of the defendants at law; and on the other matters of the reference each party has succeeded in some respects. In any view of the case, the arbitrator has usurped an authority over the costs. It has been held, where costs of a suit were to abide the event of an award, that the arbitrator could not order a *stet processus*.^(a) The clause directing that the parties shall bear their own costs respectively of the equity suit and action at law is at all events an excess of authority.

Cur. adv. vult.

Lord DENMAN, C. J., in this term, (January 11th,) delivered the judgment of the Court.

This was a motion to set aside an award on the ground of excess of authority. This action and a suit in equity by the present defendants

(a) *In re Leeming v. Fearnley*, 5 B. & Ad. 403, (27 E. C. L. R. 102.)

against the present plaintiffs, praying for an injunction to restrain the plaintiffs from proceeding in this action, were referred, and the costs of the action and of the suit in equity were directed to abide the event of the award. There were six issues in the action, as to three of which the arbitrator has found for the defendants, and as to so much of the suit of equity as regards them, against the defendants, on the ground of want of equity, they having a legal defence. As to the other three issues he has found for the plaintiffs with 5*l.* damages; but, as to so much of the suit in equity as regards them, has awarded that the plaintiffs shall be restrained, and shall not proceed to recover the damages found for them, nor costs. This is the clause complained of as an unauthorised interference with the costs of the cause: but we are of opinion that the arbitrator has not thereby exceeded his authority. The "event of the award," which the costs were to abide, means, the ultimate and general event, not each particular part; and, as the suit in equity which was referred prayed an injunction, the arbitrator clearly had power to order that the plaintiffs should be restrained on equitable grounds from proceeding to recover all that which on legal grounds they were entitled to. If it is true that he thus exercises indirectly a jurisdiction over the costs at law; but that is in the exercise of a power necessarily resulting from the nature of the reference, and without which he could not have properly adjudicated upon the suit in equity: it is by no means the exercise of a discretion as to the costs, such as the reference meant to exclude; and the costs are still left to abide the event, as the parties intended. The rule must therefore be discharged, but without costs.

Rule discharged.

DOE, on the demise of JOHN DOLLEY, against WARD and Others.—
p. 582.

Devise of freehold to testator's daughter Sarah for life, and from and after her decease to "such of her children as she now has or may have, if a son or sons, at his or their ages of twenty-three;" if a daughter or daughters, at her or their ages of twenty-one, in fee; and, in case of the death of any son or daughter of Sarah under the prescribed age, his or her share to go to the survivors and survivor of them on attaining the prescribed age, in fee; and, if Sarah should have but one child who should attain the prescribed age, all the premises to go to such only child, so attaining such age in fee; the rents and produce of the devised premises to be applied by trustees to the maintenance of the said grandchildren till they should attain the above ages. Devise over, to a son and other daughters of the testator, and their children, if all the children of Sarah should die under the prescribed ages; and a further clause directing the rents and profits to be applied for the maintenance of the children of Sarah, or of the son's and other daughters' children, "until they become respectively interested as before mentioned." Devise over, (after some intermediate clauses,) if all the testator's grandchildren then born or thereafter to be born should die under the prescribed ages "without leaving any child or children them or any of them surviving." Sarah survived the testator, and died, leaving children.

Held, that, by the will, such children took a vested interest on Sarah's death, and, consequently, that the devise to them was not void for remoteness.

A CASE was stated for the opinion of this Court, under stat. 3 & 4 W. 4, c. 42, s. 25, in substance as follows.

Thomas Dolley, being seised in fee of the freehold and possessed of the leasehold premises after mentioned, made his will on June 12th, 1819, whereby, after disposing of certain freehold and leasehold estates in favour of his son, (the lessor of the plaintiff,) and the son's children, and

after certain other devises in favour of the testator's own children, he devised as follows.

"I give to the said Thomas Challis and John Brogden (a) all those my five freehold houses in Harp Court," (describing them,) "nine freehold houses in Black Horse Court," (describing them,) "and my leasehold house," (describing it,) "with all rights and appurtenances," &c.: "also ten shares in the Eagle Insurance, London: To hold all the said last-mentioned freehold and leasehold premises and Eagle Insurance shares unto the said T. C. and J. B., their heirs, executors, administrators, and assigns, according to the nature thereof respectively, during the natural life of my said daughter Sarah Ward: Upon trust that they," or the survivor of them, &c., "do pay, or permit my said daughter S. W. from the quarter-day next after my decease, to receive and take the rents, issues, interest, and annual profits thereof respectively for and during the term of her natural life," to her own sole use, independently of any husband, "if my estate and interest in the leasehold part so long continue," (her receipts to be good discharges for rent, &c.; she keeping the premises in repair, &c. :) "And, from and after the decease of my said daughter, S. W., I give the said last-mentioned freehold and leasehold premises and Eagle shares unto such of her children as she now has or may have, if a son or sons, at his or their age or ages of twenty-three years, and if a daughter or daughters, at her or their age or ages of twenty-one years, their respective heirs, executors, administrators, and assigns, according to the nature thereof, as tenants in common: And, in case of the death of any child or children of her my said daughter, if a son or sons, under the age of twenty-three years, and a daughter or daughters, under the age of twenty-one years, the share or shares of each such child, son or daughter, so dying, to go to the survivors and survivor of such child and children, being a son or sons, on his or their attaining the said age of twenty-three years, and, if a daughter or daughters, on her or their attaining the age of twenty-one years, and their heirs, executors, administrators, and assigns, in equal shares, as tenants in common: And, in case my said last-named daughter has only one child, if a son, that shall live to the age of twenty-three years, and if a daughter, that shall live to the age of twenty-one years, I give all the said last-mentioned premises and Eagle shares unto such only child so attaining such age, his or her heirs, executors, administrators, and assigns for ever, or during my estate in the leasehold part; and direct that the rents, issues, interest, and annual produce shall, until my said grandchildren attain such ages as aforesaid, be paid and applied for and towards their maintenance and education. And further, in case all the children of my said daughter Sarah, if a son or sons, shall die under the age of twenty-three years, or, if a daughter or daughters, shall die under the age of twenty-one years, then I give all said last-mentioned premises and Eagle shares unto the said Thomas Challis, and John Brogden, their heirs, executors, and administrators, during the respective lives of my said son John Dolley, and daughters Ann Dolley and Elizabeth Maria Dolley, upon trust to pay, or permit my said son and two daughters to receive and take, the rents, profits, interest, or other the annual income thereof for and during their respective natural lives in equal shares," the daughters' shares for their separate uses, independent of husbands, "if my estate in the leasehold part so long continue; and, upon the

(a) These trustees were also named executors.

decease of my said son and two daughters, I give the share of such of them so dying unto his or her children, if a son or sons, living to the age of twenty-three years, and, if a daughter or daughters, living to the age of twenty-one years, his, her, and their heirs, executors, administrators, and assigns, if more than one in equal shares, and, if only one child, to such only child, his or her heirs, executors, administrators, and assigns. And further, in case of the death of my said son, or of either of my said two daughters without leaving a child, if a son, who shall live to the age of twenty-three, or, if a daughter or daughters, who shall live to attain to the age of twenty-one years, I give the part and parts such child or children, sons or daughters, would have had and been entitled unto as aforesaid unto the child or children of my said son and two daughters having issue, son or sons, daughter or daughters, living to attain the ages aforesaid, if two of my said last-named children have such children or child, to them, her, or him as taking in equal shares from his, her, or their father or mother, his, her, and their heirs, executors, administrators, and assigns: and, if only one of them, my said son and two daughters, leaves issue that lives to attain the age or ages aforesaid, then I give the whole of such freehold and leasehold premises and Eagle shares unto such issue, if more than one, in equal shares, their heirs, executors, administrators, and assigns, as tenants in common; and, if only one, to such one, his or her heirs, executors, administrators, and assigns. And it is also my will that the rents, profits, and interest of the said last-mentioned premises and shares shall, after all necessary outgoings for repairs, ground-rent, and insurance, be applied for and towards the maintenance of the children of my said daughter Sarah, or of my said son and two other daughters' children, until they become respectively interested as before-mentioned." (a)

The will contains no other specific devise or bequest exclusively appli-

(a) By the terms of the special case, either party was to be at liberty to refer to any part of the will. The following clauses (subsequent to the above and preceding the clause next cited in the text) were not set out in the case, but were referred to in argument.

"I give to the said Thomas Challis and John Brogden, their executors and administrators, until my grandson William Ward attains his age of twenty-three years, if he so long lives, my leasehold house and premises in Walbrook Place, Hoxton, in the parish," &c. "held by me for a long term of years, subject to the rent and covenants in the lease, upon trust to receive and pay the net rent thereof unto my said grandson until he attains that age, on his own receipt for the same; and, on his attaining the age of twenty-three years, I give the said leasehold house and premises unto him my said grandson, his executors, administrators, and assigns, for all the then residue of the said term, subject as aforesaid; but in case of his death under that age, I give the said house and premises unto my said trustees, their executors and administrators, until his eldest brother or eldest sister for the time being shall live to attain his or her age of twenty-three years, at which time I give the said house and premises unto such brother or sister first living to attain his or her age of twenty-three years, his or her executors, administrators, and assigns, for all the residue of the said term, subject as aforesaid, and direct and authorize my said trustees, their executors or administrators, to receive and pay the rents and profits of the said house and premises to such brother or sister of my said grandson as may for the time being be his eldest brother or eldest sister, until he or she attains the age of twenty-three years, on his or her own receipt for the same.

The testator directed the residue of his personal property to be sold, and ordered his executors, out of the proceeds, "to pay unto such of my grandchildren already born, or hereafter to be born, as shall be living at my decease, or unto their father or mother, or such person or persons as shall for the time being maintain and educate them respectively, the yearly sum of 9*l.* by half-yearly payments, for and towards the maintenance and education of each of such grandchildren respectively, until they severally attain their ages, if a son or sons, of twenty-three years, if a daughter or daughters, the age of twenty-one years, or day or days of marriage, at which ages, or on marriage, I give to each such grandchild 300*l.* 3 per cent. consolidated, or 3 per cent. reduced, Bank annuities, for his, her, and their own use, and not to be deemed as vested before such periods."

cable to the said hereditaments and premises ; but, after certain devises and bequests of other real and personal estate unto or in favour of Ann Dolley and Elizabeth Maria Dolley, two other of the said testator's daughters, and their children respectively, it contains a clause in these words.

"And, in case of the death of all my grandchildren, now born, or hereafter to be born, if a son or sons, under the age of twenty-three years, or, if a daughter or daughters, under the age of twenty-one years, without leaving any child or children them or any of them surviving, I give all my freehold and leasehold estates and other property, hereinbefore by me given, in trust or for the use and benefit of my said five children for their respective lives, with remainders over as before mentioned, unto and equally amongst all the children of my said sister Ann Gwillim, living at my decease, their respective heirs, executors, administrators, and assigns, according to the nature and tenure thereof, as tenants in common."

The testator died, seised and possessed as aforesaid, 26th March, 1821, and left, him surviving, his said daughter Sarah Ward, then aged forty years, and seven grandchildren, being the only children of the said Sarah Ward, the first six aged, respectively, seventeen, fifteen, thirteen, eleven, nine, and seven years, the youngest two months. John Dolley, the lessor of the plaintiff, was the testator's only son, and heir at law, and had, at the date of the will, and at the time of the testator's death, two daughters, both under the age of twenty-one, and no other children. Sarah Ward received the rents of the above-mentioned hereditaments and premises from the testator's decease till February 18th, 1830, when she died, leaving her said children, and no others, her surviving. From thence to the present time the houses in Harp Court and Black Horse Court have been claimed by them, and the rents received for their benefit.

The question stated in the case was, whether the lessor of the plaintiff was entitled to the whole or any part of the several freehold houses in Harp Court and Black Horse Court, or any share therein.

The case was argued in last Michaelmas term. (a)

Sir *W. W. Follitt*, for the plaintiff. First, the devise to Sarah Ward's children was not confined to those living at the testator's death, but comprised all the children she might have during her lifetime ; *Baldwin v. Karver*, 1 Cowp. 309 ; *Leake v. Robinson*, 2 Mer. 363. [*Kelly*, for the defendants, conceded this point.] Then, secondly, by this devise, no estate vested in the children till they respectively attained the ages of twenty-one and twenty-three, and consequently the devise is void for remoteness, because some child of Sarah Ward might have taken under it more than twenty-one years after her death. There is not, in this case, any direct devise to the children, independently of their attaining the prescribed ages. The freehold and leasehold premises and shares are given to Challis and Brogden, in trust to pay Sarah Ward the rents and profits during her life, and from and after her decease the testator gives the premises and shares to such of her children as she now has, or may have, if a son or sons, at his or their age of twenty-three years, and if a daughter or daughters, at her or their age of twenty-one years. His design in this may be illustrated by a subsequent clause

in the will, where he gives his house in Walbrook Place to his grandson William Ward, on his attaining the age of twenty-three, and where it is clear from the context that the grandson's interest in the term is not to vest before. In some cases of this kind, where the devise has been, not to a class of persons, but to individuals by name, the Courts have held, in favour of the testator's intention, that the individuals took a vested interest at the testator's death, subject to being divested, in the case of each individual, if he died before attaining the requisite age. But here the devise is to a class, and, if void as to any member of that class, must fail altogether. The case precisely resembles *Leake v. Robinson*, where the direction was that, on the decease of W. R. R. without issue living at the time of his death, the trustees should pay certain sums to the brothers and sisters of W. R. R., share and share alike, upon his, her, or their attaining twenty-five; and it was held that the brothers and sisters (some of whom were born after the testator's death) constituted a class, and that the devise was void for remoteness. The reasoning of Sir W. GRANT, M. R., in that case applies to this. It cannot be said that the enjoyment, merely, is postponed till the attainment of the specified ages; the interest does not vest till then; for there is no gift to the devisees, antecedent to the clause pointing out the ages at which they are to take. (b) The will directs that the rents of the premises shall be applied towards the maintenance and education of Sarah Ward's children until they attain the specified ages. It must be presumed that so much only would be applied to these purposes as the trustees thought fit; but no direction is given as to the surplus which may accrue; that, therefore, according to the reasoning in *Leake v. Robinson*, would not vest, but fall into the capital, and follow the ultimate destination of it, pursuant to the will. As to the particular words of devise, Sir W. GRANT says, in *Leake v. Robinson*, "It was supposed that the clauses in the will, where the word *such* is left out, might be construed differently from those in which it is inserted; and that, although, where the payment is to be to *such* child or children as shall attain twenty-five, nothing could vest in any not answering that description, yet, where the payment is to be to children upon the attainment of twenty-five, or from and after their attaining twenty-five, the vesting is not postponed. If there were an antecedent gift, a direction to pay upon the attainment of twenty-five certainly would not postpone the vesting. But if I give to persons of any description *when* they attain twenty-five, or upon their attainment of twenty-five, or from and after their attaining twenty-five, is it not precisely the same thing as if I gave to *such* of those persons as should attain twenty-five? None but a person who can predicate of himself that he has attained twenty-five, can claim any thing under such a gift." [PATTESON, J. He is speaking there of a naked gift, without remainder over.] Sir W. GRANT

(a) Sir W. W. Follett read the following passage, from the judgment of the Master of the Rolls above mentioned, 2 Mer. 385. "It is not the enjoyment that is postponed; for there is no antecedent gift, as there was in the case of *May v. Wood*," (3 Bro. C. C. 471.) "of which the enjoyment could be postponed. The direction to pay is the gift, and that gift is only to attach to children that shall attain twenty-five. The case of *Butsford v. Kebbell*" (3 Ves. 363) "was much more favourable for the legatee; for the interest of the fund was given to him absolutely until he should attain the age of thirty-two, at which time the executrix" (testatrix) "directed her executors to transfer to him the principal for his own use. He died under thirty-two." Lord Roselyn said, "There is no gift but in the direction for payment, and the direction for payment attaches only upon a person of the age of thirty-two. Therefore he does not fall within the description."

proceeds to comment on *Booth v. Booth*, 4 Ves. 399, and then adds: "Here, interest is not given to children dying before twenty-five." "How is it possible, therefore, that a child can be said to have a vested interest before twenty-five, when it has neither a right of enjoyment, a capacity of transmission, or a ground of claim, until after it shall have attained that age?" The same arguments apply here. Before the specified ages no one of Sarah Ward's children could have devised or brought ejectment. It is true that the will contains a devise over, "in case of the death of all my grandchildren, now born or hereafter to be born, if a son or sons, under the age of twenty-three years, or, if a daughter or daughters, under the age of twenty-one years, *without leaving any child or children them or any of them surviving*;" and it may be inferred from this that an interest was meant to vest in the sons and daughters before they attained twenty-three or twenty-one, which would be transmissible to their children if they had any. But this is inconsistent with the previous clause, which unquestionably gives the share of any son or daughter of Sarah Ward, dying before the specified age, to the survivors of such sons or daughters respectively. And in *Leake v. Robinson* there were similar provisions of the will, inconsistent, as was contended, with a supposition that the testator conceived himself to have postponed the vesting: but Sir W. GRANT allowed them no weight, "as none of these clauses make any new gift to the grandchildren, nor can they alter the terms or conditions of that which had been already made." That case, therefore, is an express authority for the present plaintiff; and it was there held that, if the bequest might be void for remoteness as to any one of the devisees, the Court could not pronounce it good as to the class. In *Bull v. Pritchard*, 1 Russ. 213, the testator bequeathed a residue to trustees who were to invest it in the funds, and pay the dividends to his daughter during her life, and, from and after her decease, to pay and transfer the stock "unto and equally between and amongst all and every the child and children of my said daughter," "who shall live to attain the age of twenty-three years." This was held equivalent to a devise *upon* their attaining that age, rendering, therefore, the attainment of that age a condition precedent to the vesting of any interest in them; and the devise was considered too remote. That was a decision as to leasehold estates only, (which were comprehended in the residue,) not leasehold and freehold intermixed, as here; but Lord GIFFORD, M. R., does not found any distinction on that circumstance. And in that case, as here, there was a gift over if the children should all die under twenty-three, without issue. In *Vawdry v. Geddes*, 1 Russ. & M. 203, the testatrix left the interest or produce of certain funds to her sisters during their lives, and directed the same, after their deaths, to be applied in the maintenance of their children respectively, or accumulate for such children's benefit, until they should attain twenty-two, when they should be entitled to their proportions of the principal. It was argued that the bequest gave each child, as it came into existence, a vested interest, subject to the contingency of being divested if such child died under twenty-two. But Sir J. LEECH, M. R., held the case undistinguishable from *Leake v. Robinson*. "In that case," he said, "Sir WILLIAM GRANT proceeds upon this principle,—that the prescribed time cannot be considered as marking only a time of postponed payment, because there is no antecedent gift—no gift but in the direction to pay at the particular period."

As to the cases which may be cited for the defendant. In *Doe dem. Hunt v. Moore*, 14 East, 601, lands were left to J. M. "when he attains the age of twenty-one years," but, in case he should die before attaining that age, then over; and the estate was held to vest on the testator's death, though subject to being divested if J. M. should die before attaining twenty-one. That, however, was not a question of remoteness, but only as to the right of the heir at law before the specified period. The devisee was a person in esse at the time of making the will, and would clearly have been entitled if he had lived till twenty-one; the only question was, whether the testator meant to die intestate as to the antecedent period. *Bromfield v. Crowder*, 1 New Rep. 313, was a similar case. So in *Doe dem. Roake v. Nowell*, 1 M. & S. 327, the question was, not on the validity of the devise, but on the time at which the estate vested. The case most adverse to the plaintiff is *Farmer v. Francis*, 2 Bing. 151, S. C. 9 B. Moore, 310, (9 E. C. L. R. 354.) There the testator devised to trustees, in trust for his wife and daughter for their respective lives, and afterwards in trust for, and he devised to, the child or children of the daughter who should be living at the decease of the survivor of them the testator's said wife and daughter, to be divided share and share alike when and as they should respectively attain the age of twenty-four: and, the devise to the children being contested as too remote, it was held that they took equitable estates under it. But in that case the devise made a clear original gift to the children; the mention of particular ages only fixed the time of distribution. As was then contended at the bar, the property, "having been given absolutely," "is to be *divided*, when and as they attain twenty-four. From *Boraston's Case*, 3 Rep. 19 a., to *Doe dem. Roake v. Nowell*, such a condition has been esteemed a condition subsequent." And, further, that was a devise of residue, and therefore to be construed adversely to the heir and favourably to the devisees: and there was no provision answering to the clause of survivorship among the children, which in the present case conclusively shows that the estates were not to vest before the specified ages.

Kelly, *contra*. There is no real distinction between cases where the question has been whether the devise was too remote, and those in which nothing but the time of vesting was in dispute. The question here is when the testator meant the property to vest; if before the specified ages, the devise is not too remote. This is an establishment for younger branches of the testator's family: and, looking to the provision made for the other members, it is not probable that he intended the property in question to go to his heir at law in the case which has occurred. *BEST*, C. J., says, in *Duffield v. Duffield*, 1 Dow & Clark, 311, "The rights of the different members of families not being ascertained whilst estates remained contingent, such families continue in an unsettled state, which is often productive of inconvenience, and sometimes of injury to them. If the parents attaining a certain age be a condition precedent to the vesting estates, by the death of their parents before they are of that age children lose estates which were intended for them, and which their relation to the testators may give them the strongest claim to. In consideration of these circumstances, the Judges, from the earliest times, were always inclined to decide that estates devised were vested; and it has long been an established rule for the guidance of the courts of Westminster, in construing devises, that a.

estates are to be holden to be vested, except estates in the devise of which a condition precedent to the vesting is so clearly expressed that the courts cannot treat them as vested without deciding in direct opposition to the terms of the will. If there be the least doubt, advantage is to be taken of the circumstances occasioning the doubt; and what seems to make a condition, is holden to have only the effect of postponing the right of possession." And on this principle of construction it was held, as early as the case of *Edwards v. Hammon*, 3 Lev. 132, that a surrender by a copy-holder to the use of his son and son's heirs, "if he live to the age of twenty-one years; provided, and upon condition, that if he die before twenty-one" the land shall remain to the surrenderor, did not create a condition precedent. No real distinction arises from the estate being given to a class. In *Farmer v. Francis* that circumstance was not attended to: the case turned upon the words used in the devise, which did not materially differ from those in question here; and the Court acted upon the rule of construction just cited.

Then, on the terms of this bequest, had the children of Sarah Ward, on the testator's death, a vested or a contingent interest? In *Boraston's Case* the testator devised the upper part of close R. to A. for eight years, and then to testator's executors, "until such time as Hugh Boraston" (his grandson) "shall accomplish his full age of twenty-one years, and the mean profits to be employed by my executors towards the performance of my last will and testament: and *when the said Hugh shall come to his age of twenty-one years*, then I will he shall enjoy the said upper part to him and to his heirs for ever:" and it was held that the remainder vested in Hugh, though he never attained twenty-one; for that the words "when" and "then," when they refer to a thing which must of necessity happen, (as death or the expiration of a term,) make no contingency. In that case the devise to the executors was not peculiarly for the benefit of the grandson, but for the general purposes of the will. In *Bromfield v. Crowder*, where the words were, "I give all my real estate" to J. D. B. "*if the said J. D. B. shall live to attain the age of twenty-one years*," even the word "if" was held to make not a condition precedent, being controlled by the context. The judgment of Sir JAMES MANSFIELD in that case is, in all essential respects, applicable to this. The context in the will was relied upon there; and in this case there is nothing in the context to raise an inference that the testator did not mean Sarah Ward's children to take till they attained the specified ages. In the case of his grandchildren, where he intended that the legacies of stock bequeathed to them on their attaining certain ages should not vest before, he has stated that intention in express terms. In *Doe dem. Hunt v. Moore*, the words "*when he attains the age of twenty-one years*" were held not to make a condition precedent to the estate vesting. The case nearly resembles this; and whether or not the immediate question turned on remoteness can make no difference. In *Doe dem. Roake v. Nowell*, a devise to J. R., and, on his decease, to and among his children, equally, *at the age of twenty-one*, and their heirs, as tenants in common, was held to give the children vested remainders. [*PATTESON, J. Randall v. Doe dem. Roake*, 5 Dow, 202, was a decision to the same effect on the same devise.] In *Warter v. Hutchinson*, 1 B. & C. 721, (a) (8 E. C

(a) See *Warter v. Hutchinson*, Brod. & B. 349, (6 E. C. L. R. 147.)

L. R. 199,) lands were devised to trustees till J. W., the testator's nephew, should attain twenty-one, and, if he should die in the mean time, then till H. W., the testator's second nephew, should attain twenty-one, in trust to raise out of the rents and profits certain sums of money, out of which they were to pay the testator's debts, &c., legacies, and the charges of J. W.'s maintenance and education till he should attain twenty-one, and upon that event to pay J. W. the residue, if any, of the said rents and profits; with a similar disposition for the maintenance, &c., of H. W. in case J. W. should die before the prescribed age. There it was held that, on the testator's death, J. W., not then of age, took a vested estate for life in the devised premises. No case at common law has been cited, in which a different rule of construction has prevailed.

As to cases in equity. In *Snow v. Poulden*, 1 Keen, 186, the words "The rest of my property to be invested in land, and given to my grandson," T. F. S., he "*not to be of age to receive this until he attains his twenty-fifth year*," were held to give an immediate vested interest. In *Bland v. Williams*, 3 Mylne & K. 411, the testator devised a residue to trustees, upon trust to receive the rents and proceeds, and apply them, or *a sufficient part thereof*, to the maintenance and education of the child or children of the testator's daughter, until they should respectively attain the age of twenty-four; and, *when and as they should respectively attain* that age, then to pay, assign, &c., all the residue, with such proceeds as should not have been applied for and towards their maintenance and education, "*equally unto and amongst all her said children, when, and as they shall severally and respectively attain their said age*." And, in case any or either of the children should die before attaining that age, and without leaving lawful issue of his or her body, the trustees were to pay, assign, &c., all the residue to such of the said children as should attain twenty-four, share and share alike, if more than one, and, if but one, then the whole to that one: remainder over, if all should die under the age and without leaving lawful issue as aforesaid. There Sir J. LEACH, M. R., said that the gift over was not simply upon the death under twenty-four, but upon the death under twenty-four without leaving issue: and therefore that the devise was, in effect, of "a vested interest with an executory devise over, in case of death under twenty-four, without leaving issue." And he observed that all the cases on the subject, except *Bull v. Pritchard*, 1 Russ. 213, were reconcilable with the distinction which he then took. Here, the devise over to the children of the testator's sister is to take effect if all the grandchildren die "without leaving any child or children them or any of them surviving." *Bland v. Williams* closely resembles the present case. There, as in this instance, the devise was to a class. And the argument from the appropriation of profits for the benefit of the children before the prescribed age is stronger here than in that case, because here the whole mesne profits (after necessary deductions) are to be so applied: there a discretion was given to the trustees. *Murray v. Addenbrook*, 4 Russ. 407, is a case not distinguishable from the present. There the bequest was of annuities, after the death of the testator's wife, to the eldest surviving son of Sir J. M., upon his coming to the age of twenty-five; the interest in the mean time (after the wife's demise) to be applied to the use of such eldest son, as might seem most proper to the trustees

ominated in the will. Lord LYNDBURST, C., held that the gift vested in the eldest son before twenty-five; laying stress on the circumstance of the whole interest being appropriated to the use of such eldest son (though under the direction of trustees) from the death of the widow. In *Phipps v. Williams*, 5 Sim. 44, there were two devises to trustees, one in trust to convey lands to G. H. A., *when and so soon as* he should attain twenty-one, remainder over if he should die before twenty-one without leaving issue, &c.; the other in trust to convey lands to J. C. when he should attain twenty-four, upon his giving certain security and executing certain deeds. The first devise was held to give an immediate vested remainder to G. H. A.; the second was held not to give such remainder to J. C., because, as Sir L. SHADWELL, V. C., said, "the mere attainment of the age is not the only thing by which the testator marks the time at which it shall be determined whether the estate shall vest or finally become not liable to be divested; but there is a preliminary act to be done, without the doing of which J. A. never would be entitled to call for the conveyance of the legal estate." "That is, in my opinion, clearly a condition precedent." The case, in this respect, resembled *Duffield v. Duffield*, 3 Bligh, N. S. 260, where the devise was to the testator's grandson on his attaining the age of twenty-one and changing his name, and it was held that the vesting of the estates was subject to a condition precedent. It is to be observed, however, that on the second point in *Phipps v. Williams* a contrary opinion to that of Sir L. SHADWELL was afterwards expressed by Lord BROUGHAM, C., in the House of Lords, in *Ackers v. Phipps*, 3 Clark & Finely, 665; see p. 700. *Vaudry v. Geddes*, 1 Russ. & M. 203, is distinguishable from this case, because the will there contained no direct bequest to the sisters' children, but only stated that, on attaining the requisite age, they should "*be entitled* to their proportion of their mother's share," &c., and the clause as to the issue of the children was expressed in the same manner: and hence the Master of the Rolls observed (adopting the principle formerly acted upon by Sir W. GRANT) that the prescribed age could not be considered as marking only a time of postponed payment, because there was "no antecedent gift—no gift but in the direction to pay at the particular period." Here the words, "I give," &c., "unto such of her children as she now has or may have" are a distinct gift, antecedent to the direction as to the period of vesting. So in *Leake v. Robinson*, 2 Mer. 363, Sir W. GRANT remarked that there was no direct gift; it was only from the directions laid down for the trustees that the intended benefits could be ascertained. *Bull v. Pritchard*, if in point, is the unsupported decision of one learned Judge, and does not appear to have been satisfactory to the profession; *Leake v. Robinson*, and *Farmer v. Francis*, 2 Bing. 151, (9 E. C. L. R. 354,) S. C. 9 B. Moore, 310, were the only material authorities cited in argument: the decision related only to personalty; and legacies of personalty have been held subject to different rules of construction from devises of realty, as to the period of vesting; *Doe dem. Hunt v. Moore*, 14 East, 601. And the bequest in *Bull v. Pritchard* was not in the form of a direct gift, but of an instruction to the trustees. In the present case, if the argument for the plaintiff be correct, no provision is made for the issue of any grandchild dying before twenty-one or twenty-three, and no effect is given to the words "without leaving any child or children them or any of them surviving," though, accord

ing to some decisions, less cogent expressions are sufficient to give an estate tail by implication. But it is enough here to rely upon the language of the principal clause, as vesting an immediate interest by direct words of gift. Those words must prevail, unless the Court see something actually repugnant to them in other parts of the will. All the grandchildren now claiming were born at the time of the testator's death.

Sir *W. W. Follett*, in reply. The question is, not what the testator intended, but what effect is produced by the words he has employed. The estates are left not to the children of Sarah Ward, generally, but to "*such of her children as she now has or may have, if a son or sons, at his or their age or ages of twenty-three years, and, if a daughter or daughters, at her or their age or ages of twenty-one years.*" And in a subsequent clause it is directed that the profits and interest of the premises and shares shall, after necessary outgoings, "be applied for and towards the maintenance of the children of my said daughter Sarah, or of my said son and two other daughters' children, *until they become respectively interested as before mentioned.*" Under such a devise, can it be said that the grandchildren took such a vested interest as entitled them to dispose of the devised estates immediately on the death of Sarah Ward? In all cases like the present this has been the real question. It was so in *Duffield v. Duffield*, 3 Bligh, N. S. 260, as to the point referred to on the other side: and there *BEST*, C. J., in delivering the opinion of the Judges, said: p. 330, "Whilst estates remain contingent, those in whom they are at a future time to be vested, have no interest in the estates, or the rents and profits of such estates. Such estates must descend to the heir, if they are not given to any person to hold until the events happen on which they are to become vested." And he mentions, as a case in which inconvenience results from this omission, "If the parents attaining a certain age be a condition precedent to the vesting estates by the death of their parents." In *Boraston's Case*, 3 Rep. 19 a, (which, it may be observed, was the case of a gift without remainder over,) the question discussed was, when the estate of the devisee Hugh Boraston commenced in possession, and whether the form of devise postponed such vesting in possession till he attained the age of twenty-one. In *Edwards v. Hammond*, 3 Lev. 132, the question was whether the devisee, before attaining his age of twenty-one, might bring ejectment. Could the children of Sarah Ward have brought ejectment immediately on her death? The right of present possession was claimed for the devisees in *Doe dem. Hunt v. Moore*, 14 East, 601; *Doe dem. Roake v. Nowell*, 1 M. & S. 327, and *Randoll v. Doe dem. Roake*, 5 Dow, 202. And neither in those cases, nor in *Bromfield v. Crowder*, 1 New Rep. 313, or *Farmer v. Francis*, 2 Bing. 151, S. C. 9 B. Moore, 310, (9 E. C. L. R. 354,) was there any clause answering to the clause of survivorship (already commented on in this case) among Sarah Ward's children, or any direction as to the application of mesne profits, by which a control over the estates was given to trustees between the alleged vesting of the interest and the attainment of the prescribed age. Here, as was argued in *Farmer v. Francis*, "the devise" "being to a class of persons, it is clear that the division proposed by the devisor could not be made, nor his intention carried into effect, till time should have shown how many of that class would attain" the prescribed ages.

These observations on the cases at common law may also be applied to the cases in Chancery, as *Snow v. Poulden*, 1 Keen, 186. It was expressly held in *Pulsford v. Hunter*, 3 Bro. Ca. Cha. 416, that a bequest for the maintenance of children did not vest the legacy in them. Here, whatever might be the interest of the trustees, the grandchildren clearly had no right, vested in possession, to those proceeds which the trustees were to apply for their benefit. *Murray v. Addenbrook*, 4 Russ. 407, was decided with reference to the intention of the testator as evinced by the particular provisions and language of the will. The decision in *Blund v. Williams*, 3 Mylne & Keen, 411, turned upon the words, "*without leaving lawful issue*," in the clause containing the gift. Those words controuled the other parts of the bequest: had they been wanting, it seems that the Master of the Rolls would not have held the interest to be vested. [PATTESON, J. He says that the distinction on the words "*without leaving issue*" is the key to all the cases except *Bull v. Pritchard*, 1 Russ. 213.] The effect of the words "*without lawful issue*," was not brought to the notice of Lord GIFFORD, in that case. In *Phipps v. Williams*, 5 Sim. 44, the gift (in the case of George Holland Ackers) was, "when, and so soon as he, my said godson, shall attain his age of twenty-one years;" but, in case he should die before attaining that age, "*without leaving issue of his body*," &c., then over; and there the interest was held to be vested immediately, and the party entitled to the rents and profits. The words of gift in the present devise contain no such clause; the subsequent devise over, if the grandchildren all die without leaving any child or children them surviving, would be important if it were not for the clause of survivorship among the grandchildren, by which the share of any one dying is given to the rest, without any reservation in the case of issue being left. While such a clause could operate there could be no vested interest.

Cur. adv. vult.

Lord DENMAN, C. J., in this term (January 15th) delivered judgment. After reading the words of devise set out, ante, pp. 205, 206, from "I give to the said Thomas Challis and John Brogden," &c., to the end of the clause giving survivorship in case of the death of any child or children of Sarah Ward, if a son, under twenty-three, and, if a daughter, under twenty-one, his lordship stated that the question on this devise was, whether the vesting of these estates was not postponed till the devisees should attain twenty-three, in which case the devise was too remote, and the lessor of the plaintiff would be entitled to recover as heir at law. His lordship then proceeded as follows.

The defendants relied on the doctrine of *Boraston's Case*, which has been recognised in so many others, among which it is not improper to specify *Edwards v. Hammond*; *Doe dem. Hunt v. Moore*; *Bromfield v. Crowder*, affirmed in the House of Lords, and *Farmer v. Francis*.—The plaintiff mainly relied on *Leake v. Robinson*, *Bull v. Pritchard*, and *Vuodry v. Geddes*. But *Leake v. Robinson* was decided by Sir W. GRANT, and *Vuodry v. Geddes* by Sir J. LEACH, on the peculiarity that those devises contained no direct gift to the class intended to be benefitted, but only a direction to trustees to pay after the happening of the event. *Leake v. Robinson* indeed admits of another distinction; for the class is there described under the appellation of such of the children as shall attain twenty-five; and similar language in both respects is employed in *Bull v. Pritchard*, which was decided in the

early time of Lord GIFFORD as Master of the Rolls, and is said to have failed to give satisfaction. If that is so, no more striking proof can be given how strong is the disposition to control the sense of words by which conditions precedent to the vesting of estates would seem to be indisputably created. For, if a devise to such as may attain twenty-five, or to the children of A. who shall attain twenty-four, will vest an interest in those who never attain the age described, the description given by the testator of the objects of his bounty is actually varied by the Court. Perhaps even this went no farther than the application of the same principle to the case of a devise "if" he shall attain twenty-four, (a) which was undoubtedly a large step beyond a devise *when* he shall attain twenty-four. If the cases ran upon any nice construction of the will, we might be required to state our reasons for thinking, that "at the age" no more created a condition precedent than the phrases employed in former cases. But we are relieved from the necessity of doing so by an express decision on this very point in *Doe dem. Roake v. Nowell*, 1 M. & S. 329, and *Randoll v. Doe dem. Roake*, 5 Dow, 202, in the House of Lords, which arose upon the same will. An attempt was made to distinguish those cases from the present, because in them, the devise being to the children at their age of *twenty-one*, no question of invalidity on the ground of remoteness arose. But the time when, under such a devise, the estate is vested is wholly beside the question of remoteness: neither does the express devise over to the other children, in the event of one dying under twenty-three, which was wanting in *Doe dem. Roake v. Nowell*, make such a distinction as to escape from the authority of that case.

A further distinction was attempted to be made between a devise to an individual and to a *class*, but we do not think that distinction tenable in the absence of authority; and, even if it were, the case of *Doe dem. Roake v. Nowell* is an answer; for that was the case of a class. Upon the whole, we are of opinion that the children took vested estates in remainder immediately on the death of the testator, and that the plaintiff is not entitled to recover.

Judgment for defendants. (b)

(a) See *Bromfield v. Crowder*, 1 New Rep. 313.

(b) See *Doe dem. Cadogan v. Ewart*, 7 A. & E. 636, (34 E. C. L. R. 187.)

M'CARTHY against COLVIN and Others.—p. 607.

Plaintiff, by letter, desired his agent to receive a sum of money for him, and, after making certain payments, transmit the surplus through the house of defendants, a mercantile firm in London, to be placed to the plaintiff's credit at Calcutta. The agent paid in the surplus, 419*l.* at defendants' house, showing them plaintiff's letter. Defendants received the sum on plaintiff's account, entered it in their books to the account of C. and Co., their correspondents at Calcutta, and wrote to C. and Co., informing them that they had so done, and desiring that C. and Co. would account with plaintiff, at the rate of so much per rupee. Defendants charged one per cent. commission. Before the letter from defendants arrived at Calcutta, C. and Co. stopped payment. Defendants, after placing the 419*l.* to account, paid bills drawn on them by C. and Co., to a much larger amount; but it did not appear whether or not the general balance between the two houses was altered by such payments: On assumpsit brought against the defendants for money had and received, and plea, as to the 419*l.*, that defendants had remitted it as desired,

Held, that defendants were not liable, having done all that plaintiff required of them, and they contracted to do, for the purpose of remitting the 419*l.*; and having bound themselves to credit C. and Co. in that amount, if that house did not reject the transaction.

ASSUMPSIT for money had and received. Pleas: 1. Non assumpsit. 2. As to 419*l.* 18*s.* 9*d.*, parcel, &c., that true it is that defendants received that sum for the use of plaintiff, to wit, December 20th, 1832; but defendants say that the same was so then received by them for the use of plaintiff for the sole and specific purpose of the same being remitted by defendants for and on account of plaintiff, who then was in parts beyond the seas, viz. at Calcutta, &c., to certain persons then carrying on business as merchants and East India agents at Calcutta aforesaid, under the name, &c., of Colvin and Co., for reasonable commission and reward to defendants in that behalf, to be deducted from the last-mentioned sum: and that, within a reasonable time after the receipt of that sum by defendants as aforesaid, viz., January 8th, 1833, the said sum (a reasonable commission to defendants, viz., &c., being first deducted) was remitted by defendants for and on account of plaintiff to the said persons so then carrying on business at Calcutta, under the name, &c., according to the purposes for which defendants so received the same as aforesaid. Verification.

Replication to the second plea. That the said sum was not remitted by defendants for and on account of plaintiff to the said persons so then carrying on business, &c., in manner and form, &c. Issue thereon.

On the trial before Lord DENMAN, C. J., at the sittings in London after Trinity term, 1836, the following facts appeared. The defendants were merchants in London, corresponding with a firm of Colvin and Co. in Calcutta. (a) The plaintiff, being in Calcutta, wrote to Mr. Casterton, a solicitor in London, as follows.

“Calcutta, May 9th, 1832.

“I have this day drawn upon you in favour of Messrs. Colvin and Co. for the sum of 300*l.* at sixty days' sight; you will therefore take the necessary steps to sell out my stock in the bank, and, after duly honouring the above draft, and deducting all incidental expenses, I will thank you to transmit the surplus through the house of Messrs. Colvin, Bazett, and Co.,” (the defendants,) “to be placed to my credit here.”

Casterton sold the stock, and, after making the above deductions, paid the residue (419*l.* 18*s.* 9*d.*) to the defendants, Colvin, Bazett and Co., at the same time communicating to them the plaintiff's letter; and the defendants gave Casterton the following receipt. “London, 20th December, 1832. Received of W. Casterton, Esq., the sum of 419*l.* 18*s.* 9*d.*, on account of W. G. M'CCarthy, Esq., of Calcutta. Bazett, Colvin, Crawford, and Co.” The defendants placed the sum to the account of Colvin and Co., in their books; and within a reasonable time, namely, on January 8th, 1833, (b) they wrote to Colvin and Co., at Calcutta, as follows.

“8th January, 1833.

“No. 266, enclosed Mr. M'CCarthy's bill on Mr. Casterton for 300*l.*, which is accepted and passed to your account; and this gentleman has

(a) It did not appear that there was any partnership between this firm and that of the defendants, or between any of their members respectively.

(b) Some question was made at the trial, whether or not the notice was in reasonable time but it was ultimately agreed that earlier notice could not have been given under the circumstances.

paid us the balance of his account with Mr. M'Carthy, which we enclose, and place the money, as you desire, to credit of your account: viz.

Balance received 20th ulto.	-	-	-	-	£419	18	9
Less our commission, 1 per cent.				£4	4		
Receipt stamp	-	-	-	-	0	5	
						4	9
					£415		
					9		

which you will account to Mr. M'Carthy for at 1s. 10d. a rupee."

After giving credit as above stated, the defendants accepted and paid bills drawn on them by Colvin and Co. at Calcutta, to the amount of several thousand pounds. On May 2d, 1833, and before the defendants' letter arrived, Colvin and Co. of Calcutta stopped payment, and declared themselves insolvent. They were at that time, and had been for six months before, debtors to the defendants in an amount exceeding 5000*l*.

The question at the trial was, whether, under these circumstances, the plaintiff ought to lose, or the defendants to account for, the 419*l*. 18*s*. 9*d*. The plaintiff contended that the defendants, on receiving that sum, should have made an actual remittance, and that, if they chose to transact the business in a different manner, the risk remained with them. The defendants insisted that their responsibility ceased when they had entered the 419*l*. 18*s*. 9*d*. to the credit of Colvin and Co. of Calcutta, and given that firm notice of their having done so. The Lord Chief Justice reserved the point; and the plaintiff was nonsuited, with leave to move to enter a verdict for 419*l*. 18*s*. 9*d*.

Sir *F. Pollock*, in the ensuing term, moved according to the leave reserved, and the Court granted a rule nisi. *Buller v. Harrison*, 2 Cowp. 565, was cited. In Hilary term, 1838, (*a*)

Sir *J. Campbell*, Attorney-General, and *Bazett*, showed cause. The issue raised by the pleadings was, whether or not the 419*l*. 18*s*. 9*d*. (after the proper deductions) was remitted by the defendants to Colvin and Co. at Calcutta for and on account of the plaintiff. The defendants were to prove that it was; but it was not necessary to show that a sum in specie, or a bill to the exact amount, was sent: that was not what the plaintiff required. It is enough if a remittance was made according to the usual practice. He had desired that the sum should be transmitted through the house of Colvin, Bazett, and Co., to be placed to his credit at Calcutta in the usual course. Casterton paid in the 419*l*. 18*s*. 9*d*. at Colvin, Bazett, and Co.'s; and they placed the proper amount to the credit of Colvin and Co. at Calcutta, for the plaintiff, giving timely notice to that firm. All, therefore, that the plaintiff desired had been done. And, after the credit had been given, the defendants accepted and paid bills drawn by Colvin and Co. to an amount far exceeding that of the credit. These facts would have supported a plea of payment. Had the relative situation of the defendants and Colvin and Co. remained unaltered after the giving of credit, there might have been reason to contend, as in *Buller v. Harrison*, that nothing had taken place equivalent to a payment over, and that the defendants were compellable to refund. The decision there proceeded expressly on the

(a) January 27th. Before Lord Denman, C. J., Littledale, Williams, and Coleridge, Js

ground that, between the defendant and his principals, there had been "no new credit, no acceptance of new bills, no fresh goods bought or money advanced," and "in short, no alteration in the situation which" they previously stood in towards each other. That is not so here. In *Cox v. Prentice*, 3 M. & S. 344, the defendant, as agent, had sold the plaintiffs a bar of silver, which was ultimately found deficient in weight. The plaintiffs claimed a return of the price, tendering back the silver; but the defendant refused to give back the money, saying that he had forwarded his account to his correspondent, and credited him therein for the full sum; and, in a special action of assumpsit, this Court held the defence insufficient. Lord ELLENBOROUGH said, "I take it to be clear, that an agent who receives money for his principal is liable as a principal so long as he stands in his original situation; and until there has been a change of circumstances by his having paid over the money to his principal, or done something equivalent to it." And the test of liability recognised by all the Court was, whether or not things remained in the same state as before the money was placed to account. It was not just, here, that the defendants should run the risk of the Calcutta house stopping before it received notice of the placing to account; for the credit was available against the defendants from the moment when it was given; and they would have been liable to an action at any time afterwards, if they had refused to pay a draft of the Calcutta house to an amount covered by the 41*l.* 18*s.* 9*d.* The commission of one per cent. would not be a remuneration for the risk which the plaintiff now seeks to cast upon them.

Sir F. Pollock, (with whom was C. C. Jones,) contra. *Buller v. Harrison*, 2 Cowp. 565, and *Cox v. Prentice*, 3 M. & S. 344, show that, if the agent has not paid over the money to his principal, or done that which is equivalent, it may be recovered back; but those cases do not determine what is, in every instance, equivalent to a payment over. The act of the defendants in this case was not so. The placing to account is a payment, when followed by a change of circumstances, provided that change has reference to the particular transaction, not otherwise. Here it was impossible that the Calcutta house could have drawn on the defendants with reference to this particular credit; for they did not know that the sum had been placed to account. The plaintiff, then, is entitled to regard the transaction as if it had been the only one between the two houses; and in that case it is quite clear that the credit could not have been acted upon by the Calcutta house, and that the defendants would not be entitled to retain the plaintiff's money. If a man deposited money with a London house, for which they, at his desire, gave him a letter of credit on their correspondents at Liverpool, and the depositor, on arriving there, found that the Liverpool house had failed; could the London firm retain his deposit in reduction of their claims upon the house at Liverpool? It is said that the defendants would not run the risk of loss in case of their correspondents proving insolvent, for a commission of one per cent. only. But, if the commission is too small for that risk, it is too large for the mere trouble of receiving a sum of money and writing a letter. The acknowledgment given by the defendants is, in effect, that they have received a sum to be transmitted to the Calcutta house on the plaintiff's account; that is, for a purpose which cannot be carried into effect, the house becoming insolvent. If the Calcutta house had failed the day before the defend-

ants received the money, it is clear that the latter must have refunded the amount; but it makes no difference in principle, whether the failure happened before the payment was made, or before it could be rendered effectual by the letter of advice reaching a solvent house. It appeared in evidence that the defendants, after giving the credit, accepted and paid bills drawn by Colvin and Co. to the amount of several thousand pounds; but it was not shown what remittances they received from Colvin and Co. during the same period, nor whether the balance between the two houses was altered by those acceptances and payments. It is said that the defendants, after giving the credit, would have been bound immediately to answer any draft of Colvin and Co. to the amount of 419*l.* 18*s.* 9*d.*; but the defendants could not have been so bound, with reference to this sum, before they knew that their letter of advice had been received: and the Calcutta house, on receiving it, might, if they chose, have rejected the transaction. The defendant's letter instructed them to account with the plaintiff at the rate of so much a rupee. They might have thought the rate excessive. Until, therefore, they had signified their adoption, the transaction was not complete. It was as if goods had been sent out, with a direction to give credit at the invoice price: the consignees would not have been obliged to do so if the market had fallen in the mean time. The instruction to give the plaintiff credit at a particular rate shows that Colvin and Co. were treated, not as his agents, but as those of the defendants; to agents of the plaintiff the instruction would have been to give credit at the usual rate. The facts of the case would not support a plea of payment, nor do they bear out a plea of remittance made. [LITTLEDALE, J. Could the plaintiff have countermanded the direction after the defendants had given notice to Colvin and Co.?] They could, if the countermand had been complete before the fund had been drawn upon.

Cur. adv. vult.

LORD DENMAN, C. J., in this term, (January 22,) delivered the judgment of the Court.

This was a motion to set aside a nonsuit which had passed on the trial before me under the following circumstances. The plaintiff in Calcutta had by letter, dated in May, 1832, directed his agent, Casterton, to sell out stock standing in his name in the English funds, and, after making certain payments, "to transmit the surplus through the house of Messrs. Colvin, Bazett, and Co.," (the defendants,) to be placed to his "credit there," (at Calcutta.) Casterton accordingly, having made the sale and the payments, carried 419*l.*, the surplus, to the defendants, and showed them his letter of instructions, and immediately placed it in their books. They received the money to the credit of their correspondents at Calcutta, and gave a receipt for the money on the 20th December, 1832, as for so much received on account of the plaintiff. On the 8th January, 1833, being the earliest opportunity, the defendants wrote to their correspondents at Calcutta, a letter containing as follows. Mr. Casterton "has paid us the balance of his account with Mr. McCarthy, which we enclose, and place the money, as you desire, to the credit of your account," 419*l.*, less commission, &c., "which you will account to Mr. McCarthy for at" so much, specifying the rate per sicca-rupee, being the current rate of the day. After this date the defendants accepted and paid bills drawn by the Calcutta house on them

to an amount far exceeding the sum in question. Before the letter of the defendants reached Calcutta, the house there had stopped payment. This was the amount of the proof on the trial. The plea stated a receipt of the money for the sole purpose of being remitted for and on the account of the plaintiff, who was then at Calcutta, *to certain persons then trading there under the firm of* (describing the Calcutta firm.) for commission to be paid to the defendants within a reasonable time; and then averred that the money was so remitted. The replication traversed only the remittal modo et formâ.

The plaintiff, therefore, admits that the defendants received the money, charged only with the duty of remitting it to their Calcutta correspondents; and the question is, whether the passing the sum to their credit in account, coupled with the subsequent acceptance and payment of bills drawn by that house, amounts to a remitting of the money to them. On the part of the defendants the decisions in *Buller v. Harrison*, 2 Cowp. 565, and *Cox v. Prentice*, 3 M. & S. 344, were not questioned; but they relied upon the presence of the very circumstances, as they said, in this case, on the absence of which in those the decisions had proceeded. In the former Lord MANSFIELD said, "In this case there was no new credit, no acceptance of new bills, no fresh goods bought or money advanced. In short, no alteration in the situation which the defendant and his principals stood in towards each other on the 20th of April." The plaintiff's counsel admitted the inference to be drawn from this remark of Lord MANSFIELD; but they met the effect by alleging that here also was no change of situation between the two houses after the 20th December, because, on the one hand, the Calcutta house, not knowing of the fact of this payment, could not be taken to have drawn upon the London house on the credit of it; and, on the other, although new acceptances were given and paid by the London house, yet, as their receipts were not shown subsequently to the 20th December, it did not appear that any change in the turn of the balance between the houses had arisen.

We do not think these answers satisfactory. The question is, whether the defendants have done all which, looking at all the circumstances of the case, was, within the contemplation of both parties, cast upon them. The plaintiff desires nothing to be done out of the usual course, not a transmission of money or a bill specifically appropriated to himself. We cannot but take notice that either of these methods, or any similar one, would have been very unusual in a case like the present: and it lay upon the plaintiff specifically to have stated it if he wished it to be pursued; and that, if for no other reason, because the defendants were entitled to the exercise of an option, whether they would undertake such an agency or not. The plaintiff, however, merely requests that the surplus may be transmitted through the defendant's house, to be placed to his credit at Calcutta. The fair import of this direction, from which the contract between the parties must be collected, is, that the defendants on their part should take all means in the usual course towards giving the plaintiff credit at Calcutta for the sum mentioned. This they appear to have done, when they placed it in their books to the credit of their correspondents at Calcutta, and sent them a letter of advice to that effect. And from that moment their condition was altered; for, if the Calcutta house, being solvent, should not repudiate the letter, the defendants would be bound by it, and in the mean time they had

made themselves liable to be bound according to an election to be exercised in Calcutta, over which they had no control.

The fact of acceptances subsequently given and paid is material under the circumstance of insolvency which has since occurred at Calcutta; for, if nothing of that kind had been done, and the insolvency had supervened, which might be said to determine the power of the Calcutta house to accept the letter of credit, it might then perhaps have been contended that all the defendants had done had become merely nugatory, and the plaintiff's money, still remaining in their hands, must have been accounted for by them. As a ground, however, for construing the contract between the parties, or determining the duties cast on the defendants, the insolvency is quite immaterial: for it was clearly in the contemplation of neither at the time; and there is nothing from which it can be inferred that the defendants were to insure the plaintiff against the insolvency of their correspondents, or any house at Calcutta with whom they might have given him credit.

We decide the case, however, on the broad ground that the defendants have done all they were intended, or contracted, to do; and this rule, therefore, will be discharged.

Rule discharged.

The QUEEN against READ.—p. 619.

An order for maintenance of a bastard under stat. 4 & 5 W. 4, c. 76, s. 72, is bad, if it allege that the sessions heard evidence in corroboration of the mother's statement, without adding that the corroboration was in some material particular.

At the quarter sessions for the town and borough of Ipswich, July 1837, the justices made an order for the maintenance, by William Read, of a bastard child lately born of Maria Hare, "and which had then lately become chargeable to the parish of St. Clement" in the Ipswich Union. It recited an application to the sessions by the guardians of the union, they having first given notice of such application to Read under their common seal, and under the hands of a majority of the meeting of the said guardians. The order then proceeded: "Upon due examination of the cause and circumstances of the premises, as well upon the oath of the said Maria Hare as upon evidence in corroboration thereof, in the presence of the said William Read, it is adjudged," &c.: and it then directed certain payments to be made by Read to the guardians.

The order was brought before this Court by certiorari, and a rule nisi obtained for quashing it on several objections. Among these were: That the officers of the parish, not the guardians of the union, should have given the notice: That payment should have been ordered to the parish officers, not the guardians: That the words of the order did not sufficiently show that the child was chargeable to St. Clement's, (in answer to which objection *Reg. v. Lewis*, 8 A. & E. 881, (35 E. C. L. R.), was cited:) And that the order did not show how the mother's evidence was corroborated.

O' Malley now showed cause, and argued the several points above stated: but, judgment having been given on the last only, the argument on the others is omitted. It is suggested that the present order is de-

fective, because stat. 4 & 5 W. 4, c. 76, s. 72, requires that "no such order shall be made unless the evidence of the mother of such bastard child shall be corroborated in some material particular by other testimony to the satisfaction" of the sessions, and this order does not show how Maria Hare's evidence was corroborated. But the rule is, as to orders of justices, that, although the whole case may not appear upon the order, the Court will intend everything to be right if the order does not show the contrary; *Rex v. The Undertakers of the Aire and Calder Navigation*, 2 T. R. 660; (a) *Rex v. Cornish*, 2 B. & Ad. 498, (22 E. C. L. R.); (b) A more strict construction was adopted in *Rex v. Heath*, 5 A. & E. 343, (31 E. C. L. R.); but that was upon an order of sessions embodying a case for the opinion of this Court. Here it is said that evidence was given in corroboration; and no evidence would have that effect unless bearing on some material particular. [COLERIDGE, J. Do you contend that the words of the statute "in some material particular" are idle? Suppose evidence had been offered, impugning the character of the mother; would evidence in answer to that come within the meaning of this clause? Must not the corroboration refer to some "material particular" of her story?] The Court will not presume that the evidence was of the nature suggested. [LORD DENMAN, C. J. It is very important that clerks of the peace should follow the words given by statute: and it would have been very easy here to add the proper words.] The want of them ought not to defeat the order. [LORD DENMAN, C. J. Not if we could see that the terms used were equivalent to those required. WILLIAMS, J. The facts giving the sessions jurisdiction ought to appear.] In *Rex v. The Undertakers of the Aire and Calder Navigation*, 2 T. R. 660, this Court presumed that the rate had been published in church, though the order did not state it. [LORD DENMAN, C. J. That was a preliminary proceeding: and the Court presumed that every such proceeding had been rightly taken, where the case stated by the sessions did not point to any objection.]

Pendergast, contra, was not heard.

LORD DENMAN, C. J. This order is not merely doubtful in its terms, but defective. If it entirely omits something essential, what can we do? I am sorry it is so; but the order cannot be sustained. The necessary words are very easily supplied, and ought to have been inserted.

LITLEDALE, J. The words "in some material particular" are most material to the order.

WILLIAMS and COLERIDGE, Js., concurred.

Rule absolute.

(a) See judgment of Buller, J., p. 666.

(b) See judgment of Taunton, J. Also, *Regina v. Toke*, 9 A. & E. 233, 4, (36 E. C. E. R.)

The QUEEN against The Inhabitants of STOGUMBER.—p. 622.

Where a debtor is imprisoned in the county gaol in execution under a Court of Requests Act, (which authorises such imprisonment for a limited time,) and his wife resides in the parish where the gaol is situate, and has occasional access to him under the prison regulations, she cannot, if chargeable, be removed from the parish; for the principle, that husband and wife shall not be separated by an order of removal, applies, notwithstanding such imprisonment of the husband.

ON appeal against an order of two justices, dated 4th September, 1837, removing Sarah Stafford, wife of George Stafford a prisoner, &c., and their children, from the parish of Bedminster in the city and county of Bristol to the parish of Stogumber in the county of Somerset, the sessions confirmed the order, subject to the opinion of this Court upon the following case.

George Stafford, the husband of Sarah and father of Sarah's five children, (issue of their marriage,) was settled by birth in the parish of Stogumber. The said Sarah and the said five children had become chargeable to the parish of Bedminster at the date of the said order of removal; at which time the said George Stafford was confined in the gaol of the city and county of Bristol, which is situate in the said parish of Bedminster, in execution for 11*l.* and upwards, under the provisions of the Bristol Court of Requests act, 1 W. & M. sess. 1, c. 18, private, for one hundred days, which expired on 21st November, 1837. At the expiration of the one hundred days George Stafford was regularly discharged, and returned to his house in Bedminster to his wife and family, he being the tenant of such house, and having occupied that and other houses in Bedminster for the last fifteen years, and supported his wife and family there by his labour as a sawyer; and which he has continued to do since his discharge from prison and return to them. During the imprisonment of G. Stafford his wife was at liberty, at the times and in the manner which the rules of the prison permitted, to visit her husband. The question for the opinion of this Court was, whether under the circumstances the order of removal was good and valid.

Jardine and *Butt* in support of the order of sessions. The objection to this order will be, that it compels a separation of the husband from his wife and family. The principle of the cases which may be cited against the order, as *Rex v. Carleton*, Burr. S. C. 813, is, that it creates a virtual divorce; and it appears to have been presumed that, where the husband is living with his family, he may support them. But here the judgment of the Court of Requests had already separated the husband from his wife and family, and made him incapable of supporting them. The permissive and occasional consortium which the rules of the gaol allowed of cannot make any difference. Stat. 52 G. 3, c. 160, s. 3, does not apply, because that relates only to persons in custody on mesne process, and does not extend to county gaols. If this order be invalid, so also would the like order be, if the husband were a criminal imprisoned under sentence for a long term, or a debtor declining to take the benefit of the insolvent act: and in those cases the wife and family might be fixed for years upon the parish in which the gaol was. [COLERIDGE, J. Suppose the wife in this case had been removed, and had returned to the removing parish, without certificate, after her husband was set at liberty, he being then chargeable to that parish: would she have been a vagrant under stat. 5 G. 4, c. 83, s. 3?] Not if living with her husband: but, if she had returned before his discharge, she would have been a vagrant. If the pauper and her husband were already separated by the imprisonment, then Sarah Stafford was a married woman chargeable in the absence of her husband, like the pauper in *Rex v. Tibbenham*, 9 East, 388; but, assuming that the imprisonment had not already created a virtual divorce, *Rex v. Eltham*, 5 East, 113, shows that an order removing the wife from the husband is good if they consent; and here no reason appears for supposing that consent was not given. It

will not be presumed, against the order of sessions, that such order will separate the wife from the husband; *St. Michael in Bath v. Nunny*, 1 Stra. 544, *Rex v. Stockton*, 5 B. & Ad. 546, (27 E. C. L. R.)

Erle, contra. The order, as separating husband and wife, contravenes a general rule; and it lies on those who support the order to show how the case is excepted from that rule. The husband's absence was only temporary; for it could not exceed the time fixed by the Bristol Court of Requests act, (1 W. & M. sess. 1, c. 18, private,) even if the debt was not paid: and in fact, as soon as his imprisonment ended, he returned to his family and maintained them. It is said that the husband and wife were already so far deprived of consortium by the imprisonment as to be virtually divorced; but they had access to each other, the father might have the control of his children, and might give directions for the government of his family. If the legislature had intended that any order should be made for the removal of a family in a case like the present, some enactment would probably have been made for the purpose, like that of stat. 49 G. 3, c. 124, s. 3, (which is introduced, as the preamble states, "to avoid any pretence for forcibly separating husband and wife,") enabling the justices to remove the husband as well as the family, but to suspend the order till his release. As to *Rex v. Eltham*, 5 East, 118, the consent there was stated in the order of removal: and in *Rex v. Leeds*, 4 B. & Ald. 498, (6 E. C. L. R.,) BAYLEY, J., held that such an order, even by consent, was against public policy and good morals, and BEST, J., questioned its legality. *St. Michael in Bath v. Nunny* and *Rex v. Stockton* decide only that, if an order removing a married woman does not show where the husband is, the Court will not intend, for the purpose of vitiating the order, that it separates the wife and husband. If, under the present circumstances, an order could have been made including the husband, he might have been removed to Stogumber when his imprisonment expired, the order being suspended in the mean time; but by this order the wife and family are precluded, under penalties, from returning to Bedminster, and yet the husband could not be removed thence after his discharge from prison, being then able to support himself. (He was then stopped by the Court.)

LORD DENMAN, C. J. This case is quite clear. The wife was resident in the parish where the gaol was; and there might be a certain degree of consortium between her and the husband. There is nothing, either in the order or otherwise, that shows any right to separate them.

LITLEDAL, WILLIAMS, and COLERIDGE, Js., concurred.

Orders quashed.

The QUEEN against The Inhabitants of ST. MARY KALENDAR.— p. 626.

Since the passing of stat. 4 & 5 W. 4, c. 76, s. 66, a person cannot gain a settlement by *renting and occupying a tenement*, unless he has been assessed to and paid the poor-rate in respect thereof for a year. But he may gain a settlement by *payment of rates*, under stat. 3 & 4 W. & M. c. 11, s. 6, if he has been assessed to, and paid, poor-rate for part of the year only, provided his renting and occupation have been such as to satisfy stat. 6 G. 4, c. 57, s. 2.

Pauper took a house at a yearly rent, payable quarterly, the tenancy to be determinable at any time, on a quarter's notice. At the end of the first quarter he paid the rent, but said it was too high, and that he should quit. The landlady said that, if he would

remain, she would take off 10s. per quarter, which was agreed to, and the agreement acted upon. Pauper remained to the end of the year. Held, an occupation for a year under the original yearly hiring.

Ten days before the end of the year, pauper quitted the premises with his family, locked up the house, leaving only some few of his things in it, and went into another house. He likewise offered the key to his landlady, but she refused to accept it till the end of the year, when he gave it up to her and paid the full rent. Held, a sufficient occupation by the pauper for a year, under stat. 6 G. 4, c. 57, s. 2.

Where payment of rates for a whole year is material, it is no excuse for non-payment of the last rate that such rate, though made during the year, was not published till after its expiration.

ON appeal against an order of two justices removing Stephen Gay from the parish of St. Maurice, in the county of Southampton, to the parish of St. Mary Kalendar, in the city and borough of Winchester, in the same county, the sessions confirmed the order, subject to the opinion of this Court upon the following case.

The respondents called the pauper, who proved that he took a house in St. Mary Kalendar, of a Mrs. Page, on the 5th October, 1835, at the yearly rent of 16*l.*, payable quarterly, and that such tenancy might be put an end to by giving a quarter's notice at any period: that at the end of the first quarter he paid the rent then due: that he then complained of the rent being too high, and said that he should quit: that his landlady then said if he would remain she would take off 10*s.* per quarter from the rent, which was agreed to, and the parties afterwards acted in accordance with such agreement: that he resided in the said house till 26th September, 1836, when he with his family removed into a house which he had in another parish, having locked up Mrs. Page's house, in which he left only some few of his things: that his landlady, on being applied to on 29th September, refused to accept the key of the house till the 5th of October, on which day he surrendered the key and paid the remainder of his rent: that he was rated to all the rates made between 5th October, 1835, and 5th October, 1836: that he had paid all except the last rate, which was made on 29th September, confirmed and allowed on 4th October, and published October 9th. Of this last rate he paid no part, though his name was inserted in it; nor was it proved to have been demanded of him. It was admitted that the pauper had not gained a settlement in the appellant parish under 1 W. 4, c. 18, in consequence of his having taken in lodgers during part of the year: but the respondents contended that he had gained a settlement there by payment of parochial rates; and the sessions, being of that opinion, confirmed the order. The question, therefore, for the opinion of this Court was, whether the payment of rates, under the circumstances above stated, was sufficient, especially since stats. 6 G. 4, c. 57, and 4 & 5 W. 4, c. 76, to confer a settlement in St. Mary Kalendar. The case was now argued. (a)

Bere, and *C. Saunders*, in support of the order of sessions. The question arises under stat. 4 & 5 W. 4, c. 76, s. 66, which enacts that "from and after the passing of this act no settlement shall be acquired or completed by occupying a tenement, unless the person occupying the same shall have been assessed to the poor-rate, and shall have paid the same, in respect of such tenement, for one year." First, assuming that the occupation was such as stat. 6 G. 4, c. 57, required, there was a sufficient rating and payment of rates to satisfy stat. 4 & 5 W. 4, c. 76. The pauper paid all the rates made and published during his year

(a) Before Lord Denman, C. J., Littledale, Williams, and Coleridge, Js.

of tenancy. There was, indeed, a rate made on 29th September and allowed on 4th October; and he was assessed to this, and did not pay it. But the rate, by stat. 17 G. 2, c. 3, s. 1, was not valid till published; *Rex v. Newcomb*, 4 T. R. 368: the time for appeal is reckoned from the publication; *Rex v. Micklefield*, 1 Bott, 310, pl. 291, 6th ed., *Rex v. The Justices of Wilts*, 8 B. & C. 380, (15 E. C. L. R.) [Lord DENMAN, C. J., mentioned *Regina v. Watts*, 7 A. & E. 461, (14 E. C. L. R.)] Now the last rate in this case was not published till October 9th; and the pauper gave up his house on the 5th. And, further, stat. 4 & 5 W. 4, c. 76, s. 66, appears by its language to restrict only the acquiring of a settlement by occupation of a tenement, not the settlement (which falls under a distinct head) by payment of rates; and, if that is left upon its former footing, one assessment and payment of the rate would suffice, as was admitted by the Court in *Rex v. Ringslead*, 7 B. & C. 607, (14 E. C. L. R.), notwithstanding the statute.

Then, was there a sufficient occupation in this case to satisfy stat. 6 G. 4, c. 57, s. 2? For, if there was, the pauper is settled by payment of rates, though the requisitions of stat. 1 W. 4, c. 18, as to occupying the tenement, may not have been complied with; *Rex v. Stoke Damierel*, 6 A. & E. 308, (33 E. C. L. R.) Now, under the former statute, a constructive occupation was sufficient; the stricter rule took its rise from the introduction of the word "actually" in stat. 1 W. 4, c. 18, s. 1, as appears from *Rex v. St. Nicholas, Rochester*, 5 B. & Ad. 219, (27 E. C. L. R.) Here, the pauper did occupy the premises, according to the intent of stat. 6 G. 4, c. 57, s. 2, from October 5th, 1835, till September 26th, 1836; and he kept a constructive possession from that time till October 5th, 1836, by retaining the key, and leaving his goods on the premises. *Rex v. Great Bentley*, 10 B. & C. 520, (21 E. C. L. R.) shows that this was a sufficient compliance with the statute. It may be argued that there was not an occupation under the yearly hiring; but from the conduct of the parties it is clear they thought that the contract of October 5th, 1835, was subsisting till October 5th, 1836. By the terms of the original taking a yearly tenancy was commenced; *Rex v. Herstonceaux*, 7 B. & C. 551, (14 E. C. L. R.): and the understanding at the end of the first quarter was that the landlady should take off part of the rent if the pauper would forbear availing himself, as he was about to do, of his power to determine the engagement.

Smirke, and *C. Rawlinson*, contra. But for the case last cited it would seem reasonable to say that this was a quarterly tenancy only. Assuming, however, that it was yearly, the transaction at the end of the first quarter was an abandonment of the old tenancy, and beginning of a new one. The pauper had given notice to quit. [COLERIDGE, J. It was not acted upon.] He remained only on condition of a change in the terms of holding. [COLERIDGE, J. He waived his notice, on the rent being reduced.] An alteration, not more important than this, and by verbal arrangement, was held to create a new tenancy in *Rex v. Banbury*, 1 A. & E. 136, (28 E. C. L. R.) *Rex v. Great Chilton*, 5 T. R. 672, (a) is an analogous case.

A more weighty objection, however, in this case, is, that there was no sufficient occupation after September 26th, 1836. *Rex v. Great Bentley* has been referred to; but in *Rex v. Ditchet*, 9 B. & C. 176, (17 E. C. L. R.), there cited, all the judges present appear to have held

(a) See *Rex v. Buckingham*, 5 B. & Ad. 958, (27 E. C. L. R.), judgment of Taunton, J.

that, for the purpose of occupation, there must be a personal residence on some part of the premises. LITLEDALE, J., said, "In order to occupy, a party must be personally resident by himself or his family." [Lord DENMAN, C. J. It cannot have been meant that no occupation could take place without a personal residence. A man might occupy by bales of goods.] If he kept them there with the animus revertendi, it might be so. Either the party must himself be residing, or the house must be kept for him with the intention that he should make use of it. Here the house was shut up, and, in effect, vacant. If he had been rated for it while in that state, he might have appealed. By stat. 3 & 4 W. & M., c. 11, s. 6, payment of rates is substituted for the notice of inhabitancy required by sec. 3. But in such occupation as this there is nothing equivalent to notice; and, if a settlement is gained, the purpose of the statute is not answered. It is, as to the last period of the tenancy, as if the pauper had taken the house and never come to it, in which case there could have been no pretence for alleging an occupation. If the holding here described were an occupation, the words in stat. 6 G. 4, c. 57, s. 2, "nor unless such house or building, or land, shall be occupied," &c., "for the term of one whole year," would be needless; the words "bona fide rented by such person" would have expressed all that was meant. [Lord DENMAN, C. J. The meaning was, that a party might rent the house but never take possession; and that that should not be sufficient. Here is possession to a certain extent. The distinction that arises is not between occupation and mere holding, but between different modes of occupation. COLERIDGE, J. Suppose he had gone away, without any animus revertendi, but had left a person on the premises; would not that have been an occupation? And, if so, may not he occupy in the same manner by his goods?] The difference between occupying and merely holding is dwelt upon by LITLEDALE, J., in *Rex v. Ditchet*, 9 B. & C. 183, (17 E. C. L. R.) The payment of rates here, though sufficient to have satisfied stat. 3 & 4 W. & M., c. 11, s. 6, was not a payment of the poor-rate "for one year" within stat. 4 & 5 W. 4, c. 76, s. 66. It must be contended on the other side that the last rate mentioned in the case was not made, because it was not published, during the year; a proposition for which no authority was cited. A rate is said to be made when the parish officers have prepared it; that appears by the ordinary form of the rate itself. It often happens that the allowance cannot be obtained till long after the making; and, in the meanwhile, changes must take place in the subject-matters of the rate: but it is not held to require alteration on that account. Stat. 17 G. 2, c. 3, s. 1, enacts that no rate shall be esteemed valid "so as to collect and raise the same unless" it shall have been published; but not that, *until* published, it shall be ineffectual for all purposes. The pauper was liable to pay his proportion of the last rate for the time he resided after the making of it, according to stat. 17 G. 2, c. 38, s. 12. Paying his share of that rate would have completed his settlement; *Rex v. Bramley*, Burr. S. C. 75. [Lord DENMAN, C. J. I cannot forbear saying that words used by the judges in particular cases are sometimes pressed to an unreasonable extent. The language of LITLEDALE, J., in *Rex v. Ditchet*, 9 B. & C. 176, (17 E. C. L. R.), referred only to the question of occupation in the particular case, though it has been cited in argument as the foundation of a general doctrine. So, the time of publishing a rate is material where something is necessarily

to be dated from the publication, as the notice of appeal in *Regina v. Watts*, 7 A. & E. 461, (34 E. C. L. R. ;) but it is not therefore material so as to affect rights (as that of voting) which depend upon the party being rated. We will look into the acts of parliament and the cases.]

Cur. adv. vult.

Lord DENMAN, C. J., in this term (January 23d), delivered the judgment of the Court.

The question was whether, under the circumstances of this case, the pauper gained a settlement by payment of rates, the last rate made during the period of his tenancy not having been paid. The time at which that rate was published is not material. We think that the pauper gained a settlement by payment of rates, as he would have done before stat. 4 & 5 W. 4, c. 76, passed. The settlement would not, indeed, have been complete if the pauper had not occupied the premises for a year, within the meaning of stat. 6 G. 4, c. 57, s. 2, but we think that his occupation was sufficient under that statute, though he underlet during part of the year, and that *Rex v. Great Bentley* goes farther than is necessary for the decision of this case. Stat. 4 & 5 W. 4, c. 76, s. 66, enacts, that no settlement shall be gained "by occupying a tenement," unless the occupier shall have been assessed to the poor-rate and paid the same, in respect of such tenement, "for one year." But that does not affect the present case; for the settlement is gained here, not by occupying a tenement, but by paying rates.

Order of sessions confirmed.

COLLINGE against HEYWOOD.—p. 633.

On a contract to indemnify a plaintiff against costs, which he is afterwards called upon to pay, the cause of action arises when he pays, not when the costs are incurred, or the attorney's bill delivered to such plaintiff.

Therefore the statute of limitation runs from the time of payment.

ASSUMPSIT. The declaration recited that Daniel Potter had distrained plaintiff's goods for rent; that defendant and John Whytel, for certain reasons which the declaration specified, were desirous that plaintiff should replevy, and prosecute an action of replevin against Potter for taking such distress; and that, in consideration of the premises, and that plaintiff, at defendant's and Whytel's request, had replevied, and commenced an action of replevin, (as above,) defendant undertook and promised plaintiff "to save, defend, and keep harmless and indemnified the said plaintiff from the said distress, and all costs, damages, and expenses which he, the said plaintiff, had incurred or sustained, or should thereafter incur or sustain, by reason thereof, or by reason of the replevying of the same, or of the said action of replevin so commenced as aforesaid, or the prosecution thereof." Averment, that plaintiff prosecuted the action, &c., and, the plaint being removed, proceedings were had, &c. And that, although plaintiff necessarily incurred, laid out, and was obliged to pay, and did pay, divers sums, &c., for costs and expenses of the replevin and of the action, &c., (notice to defendant, and request to him to indemnify,) yet defendant, disregarding, &c., did not, nor would, when so requested, or at any time, save or defend plaintiff, or keep him harmless and indemnified from the

premises or any part thereof, or from the payments, costs, and charges aforesaid, or any of them, or any part thereof, or from all or any damages in respect thereof, but therein failed, &c. Common counts for work and jounries, money paid, &c., and on account stated.

Plea, (among others not material here,) that the causes of action did not accrue within six years. Verification. Traverse; and issue thereon.

On the trial before BOSANQUET, J., at the Chester Spring assizes, 1837, it appeared that the plaintiff's action of replevin was commenced in 1825. The plaintiff put in a written agreement between himself on the one part, and defendant and John Whytel on the other, bearing date April 27th, 1826, whereby, after reciting that Potter claimed part of the rents of certain estates, including the premises held by plaintiff, and had distrained upon him for his alleged proportion of such rents; that defendant and Whytel disputed such claim; and that it had thereupon been agreed that plaintiff should be indemnified from all damages on account of such distress, or any other distress or action which Potter had commenced, or might commence, against plaintiff on account of the said rent, defendant and Whytel, for themselves, and each of them, did promise plaintiff and agree with him that they, their executors, &c., or some or one of them, did and should from time to time, and at all times thereafter, save, defend, and keep indemnified the plaintiff and his goods, chattels, &c., "from the said distress, action or actions, suits, costs, damages and expenses which are now pending, or may be hereafter commenced, instituted, or otherwise incurred by reason or means of the said Daniel Potter claiming or suing for his alleged share or parts of any rent or rents arising from the said estates."

It further appeared that certain costs were incurred in the replevin suit in the course of 1826, and that the plaintiff's attorney delivered a bill to him for such costs, which he paid partly in September, 1830, and partly in 1831. The present action was commenced June 20th, 1836. The attorney's bill was delivered more than six years before. The defendant's counsel contended, that the statute of limitations began to run from the time when the costs were incurred, not from the time of paying the bill, and, therefore, that the action was too late. The learned Judge thought otherwise; and the jury, under his direction, found a verdict for the plaintiff. *Evans*, in Easter term, 1837, moved for a new trial on the ground of misdirection, and cited *Battley v. Faulkner*, 3 B. & Ald. 288, (5 E. C. L. R. 288;) *Short v. McCarthy*, 3 B. & Ald. 626, (5 E. C. L. R. 403;) *Howell v. Young*, 5 B. & C. 259, (11 E. C. L. R. 219;) *Brown v. Howard*, 2 Brod. & B. 73, (6 E. C. L. R. 25;) and *Bullock v. Lloyd*, 2 Car. & P. 119, (12 E. C. L. R. 53.) A rule nisi was granted.

Jervis and *Cottingham* now showed cause. The agreement, the incurring of costs, and the delivery of the attorney's bill, all took place more than six years before the action was brought: but the bill was paid within the six years; and the time is to be computed from that event, not the previous ones. There must be a complete cause of action before the statute can begin to run. That is consistent with *Howell v. Young*, and *Short v. McCarthy*, where the neglect complained of was complete before the six years began, though not discovered till afterwards. In the latter case, the plaintiff's counsel relied upon the non-discovery, and a supposed fraud in concealing the neglect, without contesting the principle now laid down. In *Battley*

v. *Faulkner*, where the action was for breach of a contract to deliver spring wheat, instead of which the defendant had supplied winter wheat, the Court held that the statute ran from the breach of contract, that being the gist of the action, though the declaration stated a resulting special damage, said to have accrued within the six years. The principle of that case prevails also in actions of slander; if the slander is actionable per se, the statute runs from the time of publication; but, if only by reason of special damage, then from the accruing of such damage. (a) A creditor holding a bill of exchange for his debt must, if he sue on the original consideration, proceed within six years from the time when such consideration passed; but, if on the bill, the time will run from the dishonour. In an action against a factor for not accounting, the statute runs from the time when an account was demanded and refused, the cause of action being complete then and not before; *Topham v. Braddick*, 1 Taunt. 572. The defendant here must assert that this action might have been brought when the attorney's bill was sent in; but, if the plaintiff had sued before the bill was paid, he might have recovered less than the attorney would ultimately have recovered against him: for the attorney would not have been bound by the verdict in an action to which he was no party. This is not like the case of an accommodation acceptance, where the party accommodated is absolutely bound to provide funds at the maturity of the bill. Here the defendants, by their contract, were bound only to "save, defend, and keep harmless and indemnified" the plaintiff; they might do so in other modes than by paying. Circumstances may be supposed under which, in such a case, an attorney might be induced, or obliged, to forbear prosecuting his claim: at any rate the indemnifying parties ought not to lose the possible advantage of such a termination, by the action against them vesting immediately on delivery of the bill. The plaintiff was damnified, within the meaning of the contract, when he was compelled to pay and not before. In *Bullock v. Lloyd*, 2 Car. & P. 119, (12 E. C. L. R. 53;) the indorser of a bill of exchange, which was dishonoured, induced his indorsee to sue the acceptor, promising to indemnify him against the costs of the action; and ABBOTT, C. J., certainly ruled that the indorsee might recover in an action upon the indemnity without proving that he had paid the bill of costs. But that appears to have been a hasty ruling at nisi prius, and will probably not be held maintainable. All the precedents in actions on indemnities allege that the plaintiff has paid the charges against which he was to be indemnified. If the right of action on this indemnity was complete when the bill was delivered; then, if the defendant had at that time become bankrupt, the plaintiff might have proved under his commission for the costs, or else the certificate would have been a bar; but this is contrary to *Goddard v. Vanderheyden*, 3 Wils. 262; *Young v. Hockley*, 3 Wils. 346; *Young v. Taylor*, 8 Taunt. 315. Affirmed on error, *Taylor v. Young*, 3 B. & Ald. 521, (5 E. C. L. R. 364;) and *The Overseers of St. Martin in the Fields v. Warren*, 1 B. & Ald. 491. At all events the plaintiff here is entitled to recover on the count for money paid.

Evans, contra. If the statute ran only from the actual payment, the plaintiff, by not paying, might prolong the defendant's liability at his

(a) *Roberts v. Read*, 16 East 215; *Sutton v. Clarke*, 1 Marsh. 429; *Boothby v. Morton*, 3 Brod. & B. 239, (7 E. C. L. R. 426;) *Massey v. Johnson*, 12 East, 67; and *Pickersgill v. Palmer*, Bull. N. P. 246, were cited in illustration of this part of the argument.

pleasure. *Bullock v. Lloyd*, shows that the plaintiff might have sued the defendant for the whole costs as soon as he himself was liable for them. That liability, whenever it accrued, was the damnification. [COLERIDGE, J. Suppose, after the plaintiff became liable, Whytel had paid the money. According to your argument the plaintiff might still have sued the defendant; for, if the right of action had vested, it could not have been taken away.] There would still, perhaps, have been a right to nominal damages. As to the right of action, the words of ABBOTT, C. J., in *Bullock v. Lloyd*, are positive. The count for money paid cannot assist the plaintiff, because there is no evidence of an authority for such payment without referring to the contract of indemnity. The cases under the bankrupt laws are irrelevant. Here the question is simply when a right of action attached. There are many rights of action which cannot be proved in bankruptcy. For the purpose of proof under a commission there must be a clear and ascertained debt. Unliquidated damages in an action of trespass could not be proved. *Battle v. Fulkner* is a strong authority for the defendant, and the reasoning of ABBOTT, C. J., strictly applicable. [LITLEDALE, J. There the cause of action accrued at the time when the contract was broken, though the particular damage complained of did not result till afterwards.] Here, if the contract had been to make good the costs within a given period, or, in express terms, to pay them as soon as they were incurred, no difficulty could have arisen as to the time of the breach. But the effect of the contract was, that the defendant and Whytel should be bound to pay the costs whenever they became due; not whenever the plaintiff chose to pay them.

LORD DENMAN, C. J. We thought it necessary to consider this case, because there was a ruling at nisi prius, in *Bullock v. Lloyd*, which seemed to be in point. But I think that cannot be supported: it is too clear that, in a case like this, no damage has arisen till the party to be indemnified is called upon to pay. The mere default of the surety after the debt has accrued is insufficient, because that default may be amended. Until the plaintiff was the sufferer, he had no right of action.

LITLEDALE, J. I am of the same opinion. Mr. Evans is obliged to contend that the right of action accrued at all events as soon as the attorney delivered a bill to the plaintiff. But I do not see how that can be maintained, on a contract of indemnity. In *Hodgson v. Bell*, 7 T. R. 97, (a) the defendant, by a single contract, undertook for payment of a bond at the day, and also for indemnifying the plaintiffs against another bond. The defendant became bankrupt; and the plaintiffs were afterwards called upon to pay the latter bond. The other had been forfeited before the bankruptcy; and, for that reason, it was held that the defendant was liable, before the commission, on his undertaking, and that his liability on it might have been a subject of proof; but, had not one bond been forfeited before the bankruptcy, it is evident from the language of the Court that no debt proveable under the commission would have resulted from the defendant's contract. A plea of non damnificatus, in the present case, would not have been answered by showing merely that the attorney had delivered a bill; though it would have been otherwise if the agreement had been, in terms, to indemnify when the bill should be delivered. This was a contract to indemnify merely; and the cause of action did not accrue till the plaintiff was damnified by paying.

WILLIAMS, J. The defendant here was liable in a certain event, but not while the plaintiff was untouched. In *Battley v. Faulkner*, 3 B. & Ald. 288, (5 E. C. L. R. 288,) the breach of contract was the cause of action, or there was none; but nothing fell within the six years except the special damage.

COLERIDGE, J. The short answer to the plaintiff's demand is, that no cause of action arose till he was damnified, and that he was not damnified till he had paid the bill.

Rule discharged.

(a) See *Philpott v. Kelley*, 3 A. & E. 106, (30 E. C. L. R. 40.)

FARRAR, CALVERLEY, and Another, against HUTCHINSON,
—p. 641.

In an action brought by partners to recover a debt, if the defendant, to prove payment, gives in evidence a receipt signed by one of the plaintiffs, they are not concluded, but may show that it was given under circumstances which destroy its effect, as fraud on the partners not signing.

ASSUMPSIT by drawers, against acceptor, of a bill of exchange for 50*l.* payable at three months, dated 28th August, 1837. Counts for goods sold and on an account stated. Plea, payment; on which plea issue was tendered and joined. On the trial before Lord DENMAN, C. J., at the sittings in Middlesex, after Michaelmas term, 1838, it appeared that the action was brought to recover a balance of 26*l.* on the above bill, drawn by the plaintiffs, partners in trade, for the price of goods sold by them to the defendant. The plaintiffs had become bankrupt after commencing the action; and it was carried on by their assignees. The defendant, in support of his plea, put in the following memorandum, dated January 9th, 1838. "Cash and goods from Mr. B. Hutchinson, at different times, 50*l.*, and expenses to take up the acceptance given to us on the 28th August last, at three months' date, and returned to Mr. Morris, and is now in his hands. Farrar, Calverley, and Co." This receipt, though signed in the name of the firm, was written by Farrar: and declarations of Farrar were also proved, to show that the claim in respect of the bill had been satisfied by such cash and goods. The evidence was objected to, but received. The plaintiffs proved a letter written by defendant, in April, 1838, admitting a balance of 23*l.* 1*s.* 11*d.* due from him to the plaintiffs: and they contended that the receipt had not been given *bonâ fide*, but procured for the purposes of the cause. The Lord Chief Justice left it to the jury to say whether the receipt was given *bonâ fide*, or for the purposes suggested. The plaintiffs had a verdict for 23*l.* 1*s.* 11*d.*

Cresswell, in this term, (a) moved for a new trial on the ground of misdirection. The question left to the jury, whether the receipt was given *bonâ fide*, or not, by Farrar, could not properly arise. If the plaintiffs had been continuing the action in their own right, they could not have raised the suggestion of *mala fides* against a paper given by their partner, that is, in effect, by themselves. Neither, then, can their assignees make such a defence. *Alner v. George*, 1 Camp. 392, is in point. There the defendant produced a receipt in full from the plain

(a) January 17th. Before Lord Denman, C. J., Littledale, Williams, and Coleridge, J.

tiff; and it was proposed to prove that such receipt had been given collusively to cheat the plaintiff's creditors, by whom in reality the action was brought, the plaintiff having assigned his effects for their benefit. But Lord ELLENBOROUGH said: "Sitting here I can only look to the strict legal rights of the parties upon the record; and there can be no doubt that a receipt in full, where the person who gave it was under no misapprehension and can complain of no fraud or imposition, is binding upon him." "The plaintiff might have released the action; and it is impossible to admit evidence of his attempting to defraud others, and to recognise the transfer of choses in action, without confounding all legal distinctions." Here, however, no pretence existed for imputing to Farrar a fraud on his co-partners. In *Skaife v. Jackson*, 3 B. & C. 421. (10 E. C. L. R. 137,) where evidence was held admissible to impeach a receipt given by one of the plaintiffs, fraud was shown.

Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the Court. After stating the point made in moving, his Lordship said:

Mr. *Cresswell* cited *Alner v. George*; but that case is not directly applicable. There no doubt existed that the receipt had been really given by the party whose claim it affected; but it was alleged that third persons, who had an interest in the demand, were injured by the transaction. Lord ELLENBOROUGH held that the receipt was nevertheless binding. Here the objection is, that the receipt, though signed by one of the firm for whom it is given, the members of which are the plaintiffs on the record, is a fraud upon the rest. In *Benson v. Bennett*, 1 Camp. 393, note, cited in the note to *Alner v. George*, a receipt, signed by the plaintiff, was produced by the defendant; but he was proved to have obtained it from the plaintiff by deception; and therefore it was held not binding. It appears to us that in all cases a receipt signed by a party, like any other statement made by him and produced afterwards to affect him, is evidence, but evidence only, and capable of being explained. There will, therefore, be no rule.

Rule refused. (a)

(a) See *Graves v. Key*, 3 B. & Ad. 313, (23 E. C. L. R. 79.)

DOE on the several demises of PHILLIP and WALTERS against MARGARET BENJAMIN.—p. 644.

Tenant being in possession under a demise for three years ending Michaelmas, 1836, at a rent payable at Michaelmas, the landlord and tenant agreed in writing as follows. Memorandum of agreement made 13th December, 1834, between, &c.: P. (the landlord) agrees to let the farm, &c. to B. (the tenant) for fourteen years, determinable at the end of seven years with twelve months' notice, (not stating the commencement,) at the yearly rent of 20*l.*, payable half-yearly; a lease to be drawn upon the usual terms by T. And B. agrees to take it upon the said terms.

Held, a present lease, commencing on December 13th, 1834.

The paper had only an agreement stamp. On the trial of an ejectment, it was given in evidence as an agreement. The counsel producing it were afterwards obliged, during the trial, to rely upon it as a lease. No objection was then or previously taken to the stamp. On argument in banc, as to the operation of the document, the want of a proper stamp was urged. Held, that the objection came too late, and should have been taken at that period of the trial when counsel first stated that they should rely upon the instrument as a lease.

EJECTMENT for lands in Carmarthenshire. On the trial before COLE-RIDGE, J, at the Carmarthen Spring assizes, 1837, it appeared that in 1833 William Benjamin, the defendant's late husband, had possession of the premises under the lessor of the plaintiff Phillip, for a term, which was determinable at the expiration of three years from Michaelmas, 1833, on giving six months' notice. Benjamin had entered some months before the Michaelmas of that year, on the terms of paying rent for the portion of 1833 ending September 29th, and, afterwards, from Michaelmas to Michaelmas. The amount of rent did not appear. William Benjamin continued in possession till his death, which happened early in 1836. It was proved, on the part of the plaintiff, that Phillip, in November, 1835, demised the premises to Walters, the other lessor of the plaintiff, for twenty-one years, beginning at Michaelmas, 1836: and that, in March, 1836, Phillip gave the defendant (whose husband was then dead, but who continued in possession) six months' notice to quit at the ensuing Michaelmas, when the three years ended. The defendant at the trial, put in a lease, dated 10th December, 1836, (after the commencement of this action,) from Phillip to the defendant, whereby he demised the premises (still in her possession) to her, for a term of fourteen years from December 13th, 1834. This lease referred to an agreement of the last mentioned date, which was also put in, and ran as follows.

"Memorandum of an agreement made this 13th day of December, 1834, between Jenkin Phillip of the one part, and William Benjamin of the other part. The said J. P. agrees to let the farm of Cevengrich and Tirbach to the said W. B. for the term of fourteen years, determinable at the end of seven years at the option of either party upon giving twelve months' previous notice, at and for the yearly rent or sum of 20*l*. payable half yearly, without any deduction whatever: a lease to be drawn upon the usual terms by Mr. Thomas Bishop: and the said William Benjamin agrees to take it upon the said terms. As witness our hands," &c. Signed by Phillip and W. Benjamin.

This instrument bore a *1*l** agreement stamp. The plaintiff's counsel objected that the lease could not avail, because Phillip, at the time of executing it, had demised, as before mentioned, to Walters. The defendant's counsel then contended that the agreement of December 13th, 1834, amounted to a lease. The learned judge thought that the agreement, whatever was its operation in other respects, might have disabled Phillip from giving notice to quit at Michaelmas, 1836; and he directed a verdict for the defendant, reserving the question as to the effect of the agreement, and giving leave to move to enter a verdict for the plaintiff. *Evans*, in the ensuing Easter term, moved accordingly, and contended that the instrument of December, 1834, was an agreement only, not a lease, and therefore did not put an end to William Benjamin's original lease, (*Roe dem. Berkely v. The Archbishop of York*, 6 East, 86; *Hamerton v. Stead*, 3 B. & C. 482, (10 E. C. L. R. 159,) per HOLROYD, J.) which lease, therefore, and the defendant's interest in the premises, were determined by the notice given to quit at Michaelmas, 1836. A rule nisi was granted.

Chilton and *W. M. James* now showed cause. It will be contended that the instrument of December, 1834, is not a lease, because it mentions no day from which the term shall commence. But, where that is so, the term begins from the making of the lease. "If a man says,

you shall have a lease of land in D. for twenty-one years at 10*l.* per annum, make a lease in writing, and I will seal it; it will be a lease by parol, though not in writing;" Com. Dig. tit. *Estates*, (G 1,) citing *Maldon's Case*, Cro. Eliz. 33. The same construction applies to a written agreement. In *Staniforth v. Fox*, 7 Bing. 590, (20 E. C. L. R. 249,) where the words were, I "this day agree to let" "for the term of ten years," and no time of commencement was stated, the instrument was held to be a present demise. PARK, J., there relies upon the absence of any stipulation respecting a future entry, as showing that a prospective agreement was not intended. Here no such stipulation is made. In *Dunk v. Hunter*, 5 B. & Ald. 322, (7 E. C. L. R. 115,) where the words were held not to constitute a present demise, the period of commencement was not only unmentioned, but expressly left uncertain, by the words "any time on or before the 11th day of February, 1820." If it be contended that by the writing now in question a future lease is specifically provided for, that was also the case in *Warman v. Faithfull*, 5 B. & Ad. 1042, (27 E. C. L. R. 261,) where the instrument was held to be a lease, and LITLEDALE, J., cited *Harrington v. Wise*, Cro. Eliz. 486, S. C. 1 Roll. Abr. 847, *Estate*, (X,) pl. 2. where it was said that the words "doth let" were a demise, and that the subsequent ones, as to a future lease, were "in reference to further assurance." It may be said that the nature of the intended lease is left too uncertain, because it is to "be drawn upon the usual terms," and they are no further described; but in *Doe dem. Walker v. Groves*, 15 East, 244, the future lease was "to contain the usual covenants," and yet a present demise was held to take place, Lord ELLENBOROUGH referring to *Barry v. Nugent*, cited in *Doe dem. Jackson v. Ashburner*, 5 T. R. 165. A specific performance would be decreed on such an agreement, the lease to be drawn with the usual covenants. As was said by TINDALL, C. J., in *Doe dem. Pearson v. Ries*, 8 Bing. 178, (21 E. C. L. R. 261,) if the agreement for a future lease "leaves nothing uncertain," it does not prevent the rest of the instrument from operating as a present demise. In *Chapman v. Bluck*, 4 New Ca. 187, (33 E. C. L. R. 317,) the decision was in favour of an actual demise, though the facts tended more strongly to an opposite conclusion than in the present case. In *John v. Jenkins*, 1 Cro. & M. 227, S. C. 3 Tyr. 170, (a) where the instrument was held not to constitute a lease, the rent was to be fixed according to a valuation, and sureties given for the payment: the valuation was never made, nor the rent fixed, nor sureties given. That case, therefore, differs entirely from the present. It may be said that the stamp is not a proper one for a lease: but that objection was not taken at the trial.

Evans and *E. V. Williams*, contra. The writing of December 13th, 1834, was only an agreement; and, if so, the situation of William Benjamin as tenant was not altered, the notice to quit was good, and Walter's right attached at Michaelmas, 1836. No objection to the stamp could be taken at the trial, because this instrument was put in as an agreement only, though the attempt afterwards was to use it as a lease. As to the terms of the contract, it may be admitted that, if there be an actual agreement to take and to let, a present lease is created, if there be nothing in the state of things to afford ground for a contrary conclusion. The construction, as ASHURST, J., said, in *Doe dem. Jackson v.*

(a) See *Hayward v. Haswell*, 6 A. & E. 265, (33 E. C. L. R. 79.)

Ashburner, 5 T. R. 163, "ought to depend on the intention of the parties, which must be collected from the words of the agreement and from collateral circumstances." A principal test of the intention to grant a present lease has been, that the tenant has been actually let into possession when the agreement was executed; *Hamerton v. Stead*, 3 B. & C. 478, (10 E. C. L. R. 159;) *Chapman v. Bluck*: here that test is wanting, for W. Benjamin was already in possession; and no act is proved to have been done showing a surrender of the old and a ratification of the new contract. [LITLEDALE, J. I do not see how the construction of the instrument can be affected by the letting into possession. Nothing is said of being let into possession, in the judgment of MANSFIELD, C. J., in *Morgan dem. Dowding v. Bissell*, 3 Taunt. 65.] It may be admitted that acts of the parties, subsequent to the contract, are not to be relied upon, though this was done in *Buxter dem. Abrahall v. Browne*, 2 W. Bl. 973, contrary, as it seems, to general principles of law. Looking, in this case, only to the agreement, and the circumstances which existed when it was made, the tenant was already in possession, holding at a yearly rent, and did not need any present demise: he signed a contract with his landlord, by which the landlord agreed to let; but the tenant made no agreement to take before a lease was drawn: and, of the lease to be drawn, no covenant was specified; though the tenant was to take on the terms of it. No period was fixed for the commencement of such lease. The consequence of that was, as the defendant argues, that it commenced immediately; but, if so, then, as the agreement was made on December 13th, and the former renting was from Michaelmas to Michaelmas, the landlord threw away the rent of the then current year from September 29th, which can scarcely have been intended. It must have been contemplated that the tenant should continue renting from Michaelmas to Michaelmas till the new terms of holding were provided for by the proposed lease. In *Doe dem. Pearson v. Ries*, 8 Bing. 178, (33 E. C. L. R. 317,) where the agreement, as to rent, was to take effect in the middle of a quarter, it was expressly stipulated that the first payment, for the half quarter, should be made at Christmas. In *Doe dem. Walker v. Groves*, 15 East, 244, the landlord contracted to let, and also, upon demand, to execute a lease; here the words are different; and in that case, as well as in *Poole v. Bentley*, 12 East, 168, it was expressly stipulated that the agreement then signed should be binding till the intended lease should be made.

Lord DENMAN, C. J., (after stating the principal facts of the case.) The plaintiff having proved a notice to quit, expiring at Michaelmas, 1836, the defendant undertook to show, not only an agreement, but a lease, for a further term: he accordingly produced the document of December, 1834, as an agreement, and likewise put in a lease. It was answered that, when that lease was executed, Phillip had parted with the power to grant it, by a demise in 1835 to Walters. Then the defendant's counsel insisted that the agreement was in effect a lease. And the first question is, whether the defendant's counsel, having produced it as an agreement, could afterwards set it up as a lease. For the plaintiff it is argued that this had the effect of a stratagem, because, when the instrument was received in evidence as an agreement, no objection could be taken to the stamp, which, for a lease, was insufficient. But I think that the objection should have been taken when the defendant's counsel said that he should rely on the document as a lease. There is no rea-

son that the Judge should not have said, "If you rest your title on this as a lease, it should have a suitable stamp;" that is, provided the objection had been taken; but none was made. Then, is this document, in its terms, a lease, or only an agreement? I think it is a lease. The tenant being already in possession, the landlord agrees to let him the premises for fourteen years. He means to increase his interest by the additional term; and, when he says "I agree to let," he does in fact demise it for the fourteen years. The tenant's being already in possession does not weaken the effect of the instrument. It is urged as a difficulty that the intended lease is to be "drawn upon the usual terms," and that it does not appear what those were considered to be. But the parties did not intend to create any new interest; all they contemplated was that there should be a lease drawn which should formally express the terms upon which the tenant was holding. It is also observed that no time is specified at which the lease shall commence, and that, if it is supposed, in consequence, to begin immediately, the existing term is surrendered, and a part of the current rent dropped. That may be so; but, if such is the case, it is probable that the parties did not contemplate all the consequences of their agreement. (a) It may have been intended that the new term should commence from the end of the year then running. But, however this may be, unless we saw that the parties had the loss of rent in their minds, and intended to avoid it, that consequence cannot prevail against the words of the instrument, which import a present lease. The rule must therefore be discharged; and I am not sorry that we reach a conclusion by which justice is done.

LITTLEDALE, J. The words "agree to let" have long been held the same as words of actual letting. It is said here that the agreement for a future lease is inconsistent with a present demise; and it would have been as well if that distinction had been upheld from the first: but it has been long settled that that circumstance alone will not reduce what would otherwise be a present demise to a mere agreement. As to the provision that the lease shall contain the usual covenants, MANSFIELD, C. J., certainly held, in *Morgun dem. Dowding v. Bissell*, 3 Taunt. 65, that such a description of the intended lease was uncertain, and inconsistent with the supposition of a present demise; but in later cases a different opinion has prevailed. Then it is argued that no time is fixed for the commencement of the lease, and that the intention of the parties could not be elucidated by the letting into possession, as Benjamin was in possession already. But the intention of the parties must be collected from the instrument itself. In Co. Lit. 46 b. it is said, "If the lease bear date the 26th day of May, &c., to have and to hold from the making hereof, or from henceforth, it shall begin on the day on which it is delivered, for the words of the indenture are not of any effect till the delivery, and thereby from the making, or from henceforth, take their first effect. But if it be à die confectionis, then it shall begin on the next day after the delivery. If the habendum be for the term of twenty-one years, without mentioning when it shall begin, it shall begin from the delivery, for there the words take effect, as is aforesaid." Here, then, I think the instrument must be considered as a lease from the date of the agreement. There may be a loss of rent, as was suggested; probably the parties never thought of that; but it can make no difference in point of law.

(a) See a similar observation in *Doe dem. Evans v. Evans*, post.

WILLIAMS, J. As to the stamp, I think that the objection is got over. Counsel should have taken it when the instrument was mentioned as a lease. As to the construction, *Staniforth v. Fox*, 7 Bing. 590, (20 E. C. L. R. 249,) is a case very near this in words and in principle. The result of the whole instrument here is that the tenant agrees to take on the contemplated terms, although they are not yet expressed. The mention of a future lease makes no difference. We cannot, indeed, shut our eyes to the fact that there is an extinction of rent, which the parties probably did not contemplate. A layman, perhaps, might understand that there was to be a present lease, but that the rent in question not to be merged. We must, however, give the transaction its legal effect, and not look to consequences.

COLERIDGE, J. The Courts have come to some inconsistent conclusions in cases of this kind: but from the main body of them the principle results, that we must look to the intention of the parties, and that by considering the terms of the particular instrument, with reference, I agree, to the state of facts existing at the time. We are not to regard facts which are merely collateral: but we may look to the face of the document to see whether great convenience or inconvenience would result from any proposed construction, in the state of things existing at the time to which the instrument relates. Looking to the facts in this case, I think that some might favour one construction, and some another; but upon the whole I think the fair conclusion is, that this is a lease. And it is not unreasonable to suppose that the parties, intending a present lease, did not immediately foresee all the consequences which might result from it.

Rule discharged.

LIDSTER against BORROW.—p. 654.

A gamekeeper authorized to seize the dogs of unqualified persons sporting on a manor, by deputation given before stat. 1 & 2 W. 4, c. 32, and not renewed, cannot justify seizing the dogs of uncertificated persons committing such trespass, since the passing of the act. Nor is he entitled to notice of action under stat. 1 & 2 W. 4, c. 32, s. 47, on the ground that he bonâ fide supposed himself to be acting in pursuance of the statute.

TROVER for two greyhounds. Pleas, Not Guilty, and denial that the dogs were plaintiff's. Issues thereon. On the trial before PATTESON, J., at the Durham Spring assizes, 1837, it appeared that the defendant was gamekeeper of a manor, and, in that capacity, took the dogs from the plaintiff, who was an uncertificated person, and was using them, during the night, in the pursuit of game. The defendant acted under a deputation, authorizing such seizure, given to him in 1814, and not since renewed. No notice of action had been served; and on this ground the plaintiff was nonsuited. *Knowles*, in the ensuing term, April 17th, obtained a rule nisi for a new trial, on the ground that stat. 1 & 2 W. 4, c. 32, s. 47, (a) (which requires such notice to persons sued for any-

(a) The following clauses of stat. 1 & 2 W. 4, c. 32, were particularly referred to in the ensuing argument.

Sect. 1 repeals stat. 22 & 23 Car. 2, c. 25, and other statutes, from October 31st, 1831, "except so far as any of the said acts may repeal the whole or any part of any other acts,

thing done in pursuance of that act) could not apply to a gamekeeper appointed under stat. 22 & 23 Car. 2, c. 25, s. 1, and not having had his deputation renewed; since the authorities conferred under that act, assuming them to be still in force, were materially different from those given by the recent statute.

Alexander and Ingham now showed cause. The judgment of the Court of Common Pleas in *Bush v. Green*, 4 New Ca. 41, (Mich. T. 1837,(a)) since the present rule was granted, is unfavourable to the defendant; but the decision there may be reviewed. It cannot have been intended by stat. 1 & 2 W. 4, c. 32, to take away the powers of every gamekeeper previously appointed. The only material alteration introduced by it on this head is, that the dogs of an uncertificated person, whether qualified or not, may now be seized, whereas formerly the seizure could be made only if the person was unqualified. Sect. 5 must be construed as keeping alive former deputations; and, if so, the power to seize, given by such deputations, must extend to the cases in which a seizure is authorized by this act. Sect. 47 protects, in general terms, "any person" against whom a suit shall be commenced for anything done in pursuance of this act. The defendant therefore might be entitled to notice though not acting in the execution of his duty as a gamekeeper. And if, although not so acting in discharge of a duty under the statute, he bona fide thought that he was, he may claim the benefit of notice according to *Beechey v. Sides*, 9 B. & C. 806, (17 E. C. L. R.,) and *Ballinger v. Ferris*, 1 M. & W. 628, S. C. Tyrwh. & Gr. 920; the principle of which decisions is laid down also in *Cook v. Leonard*, 6 B.

and except as to any offences which may have been committed against any of the said acts before or upon the said 31st day, and as to any penalties which may have been incurred thereunder before or upon the said 31st day, which offences shall be dealt with and punished, and the penalties recovered, as if this act had not been made, and except as to any matters done by any persons under the authority of any of the said acts before or upon the said 31st day, with respect to whom every privilege and protection given by any of the said acts shall continue in force as if this act had not been made."

Sect. 5 continues the provisions of former acts as to obtaining certificates, and enacts, that "all the powers, provisions, and penalties contained in such act or acts shall continue in as full force and effect as if this act had not been made; and that all regulations and provisions contained in any act or acts relative to game certificates, so far as they relate to gamekeepers of manors, and to the amount of duty for game certificates to be charged upon or in respect of gamekeepers of manors in the cases specified in such act or acts, shall extend and apply to all gamekeepers of lands appointed under this act as fully and effectually as if they were gamekeepers of manors, and were expressly mentioned in and charged by such act or acts."

Sect. 12 enacts, "That it shall be lawful for any lord of a manor, lordship, or royalty, or reputed manor, lordship, or royalty, or any steward of the crown of any manor, lordship, or royalty appertaining to his Majesty, by writing under hand and seal, or in case of a body corporate then under the seal of such body corporate, to appoint one or more person or persons as a gamekeeper or gamekeepers to preserve or kill the game within the limits of such manor, lordship, or royalty, or reputed manor, lordship, or royalty, for the use of such lord or steward thereof, and to authorize such gamekeeper or gamekeepers within the said limits to seize and take for the use of such lord or steward all such dogs, nets, and other engines and instruments for the killing or taking of game as shall be used within the said limits by any person not authorized to kill game for want of a game certificate."

Sect. 47 enacts, "for the protection of persons acting in the execution of this act," that, where actions shall be commenced "against any person for anything done in pursuance of this act," "notice in writing of such action, and of the cause thereof, shall be given to the defendant one calendar month at least before the commencement of the action;" and the defendant may plead the general issue, and give the act and the special matter in evidence, &c.

(a) This cause was tried at the Somersetshire Spring assizes, 1837, and a verdict found for the plaintiff. A rule nisi for entering a nonsuit was moved for in this Court, by mistake, April 18th, (the day after the motion in the present case,) and a rule nisi granted, April 25th.

& C. 351, (13 E. C. L. R.) This point was not noticed by the Court of Common Pleas in *Bush v. Green*, 4 New Ca. 41, (33 E. C. L. R.) Same powers are given by stat. 1 & 2 W. 4, c. 32, to the servants of persons entitled to the game or occupying the land; sects. 31, 36. The defendant here was at least servant to such a person, and might suppose himself legally acting as servant; and, if that would bring him within the statute, it will be taken that he did consider himself so acting, and the plaintiff cannot allege that in reality he meant to act as gamekeeper: *Briggs v. Evelyn*, 2 H. Bl. 114. [Lord DENMAN, C. J. That case goes very far.]

Knowles, contra. *Bush v. Green* decides this case. [Lord DENMAN, C. J. Not expressly as to the last point.] It does so virtually. (He was then stopped by the Court.)

Lord DENMAN, C. J. The defendant mistakenly supposed that he had the rights of a gamekeeper. If he had been a keeper, and, consequently, bound to seize if he was right in thinking that the circumstances warranted it, the cases cited on the last point might have applied. But a person fancying that he fills a character, which he does not fill, cannot claim to be protected on the principle of those cases. We are therefore bound (especially since the decision in the Court of Common Pleas) to make this rule absolute.

LITLEDALE, PATTESON, and WILLIAMS, Js., concurred.

Rule absolute.(a)

(a) See *Reed v. Cowmeadow*, 6 A. & E. 661, (33 E. C. L. R.) *Wedge v. Berkeley*, 6 A. & E. 663. *Wells v. Ody*, 2 Cro. M. & R. 128. S. C. 5 Tyrwh. 725.

DOE on the demise of CHADBORN against GREEN.—p. 658.

Land was let for one year, and so on from year to year, until the tenancy should be determined as was after mentioned, with a subsequent proviso, that three months should be sufficient notice to be given from either party, and another subsequent proviso, that it should be lawful for either party to determine the tenancy by giving three months' notice. Held, that the tenancy was not determinable by three months' notice expiring before the end of the second year.

EJECTMENT for premises in Gloucestershire. On the trial before PARKE, B., at the Gloucestershire Spring assizes, 1837, it appeared that the lessor of the plaintiff had demised the premises to the defendant by an instrument, dated 5th January, 1836, purporting to be an agreement between the lessor of the plaintiff and the defendant, whereby the former agreed to let, and the latter to take, "for one year from the date hereof, and so on from year to year, until the tenancy hereby created shall be determined as after mentioned, a house," &c., at the yearly rent of 10*l.*, to be paid quarterly, the rent to commence from 5th January, 1836, "and three months shall be sufficient notice to be given from either" of the parties. And it was further agreed "that it shall be lawful for the said Joshua Chadborn to determine the tenancy by either of us giving unto the other three months' notice of either of their intentions."

The defendant took possession under this agreement on 5th January, 1836. On 29th September, 1836, the plaintiff served the defendant with notice to quit "on the 6th day of January now next ensuing, or whenever else your tenancy expires."

The defendant's counsel contended that the lessor of the plaintiff

could not determine the tenancy at the expiration of the first year: but the learned Judge, being of a different opinion, directed a verdict for the plaintiff. In Easter term, 1837, *Tulfourd*, Serjt., obtained a rule nisi for a new trial on the ground of mis-direction.

W. J. Alexander now showed cause. (a) This was a tenancy determinable at the end of the first year by three months' previous notice. *Birch v. Wright*, 1 T. R. 378, was cited for the defendant at Nisi Prius; but the learned Baron considered *Thompson v. Maberly*, 2 Camp. 572, applicable, where a demise "for twelve months certain and six months' notice afterwards" was held by Lord ELLENBOROUGH to be determinable by a six months' notice expiring at the end of the first year. That is a stronger case than the present: for here the tenancy is only for one year certain, and from year to year, until put an end to by notice; whereas in *Thompson v. Maberly* it might have been argued that the notice could be given only after the first year had expired. In *Kemp v. Derett*, 3 Campb. 510, where the term was defined only by a stipulation that the tenant was always to quit at three months' notice, it was held that the notice might expire at the end of any quarter from the first taking. In *Doe dem. Pitcher v. Donovan*, 1 Taunt. 555; and at N. P. 2 Campb. 78, it was held that a demise at so much a year, to quit at a quarter's notice, must be determined by a notice expiring with a year of the tenancy [COLERIDGE, J. The present case rather seems to be within the first alternative there put by CHAMBER, J., 1 Taunt. 557. "If it was a tenancy from year to year, with a quarter's warning, it would be a quarter ending with the year: but if it were a demise for one year only, and then to continue tenant afterwards, and quit at a quarter's notice, it would be a quarter ending at any time."] Upon any view, this notice, inasmuch as it expired with the first year, satisfies the rule, unless the demise be for two years certain. *Birch v. Wright*, which was cited to show that the demise was for two years, did not decide this; the main question was upon another point. Here the agreement, by its terms, and especially by its repeating the provision as to notice, shows an intention that the term was to be determined by a notice expiring at any time. No case has occurred in which the expressions were exactly similar to these.

Tulfourd, Serjt., contra. The argument for the plaintiff would show that three months' notice, given at any time after the commencement of the tenancy, would determine it: and then the expression "so on from year to year" would have no effect. In the first instance, laying out of consideration the clause as to notice, there is a tenancy for two years certain: that is established by the remarks of BULLER, J., in *Birch v. Wright*, where he collects and comments on several cases, and by *Denn dem. Jacklin v. Cartwright*, 4 East, 29. Then what is the effect of the proviso as to notice engrafted on such a tenancy? It cannot apply to the end of the first year rather than the second: it merely enables either party, at the expiration of any year after the first, to determine the tenancy by three months' notice. *Thompson v. Maberly* was a very different case. There the demise was "for twelve months certain, and six months' notice afterwards." Lord ELLENBOROUGH decided upon the effect of the word *certain*, as showing that all beyond the twelve months was uncertain. This explains the decision, which, at first sight seems a singular one, as giving no effect to the word *after-*

(a) Before Lord Denman, C. J., Littledale, Williams, and Coleridge, Js.

wards. [*W. J. Alexander. In Denn dem. Jacklin v. Cartwright*, the words were "not for one year only, but from year to year."]

Cur. adv. vult.

LORD DENMAN, C. J., in this term, (January 29th,) delivered the judgment of the Court. After stating the facts, and the arguments, his Lordship said,

We think that my brother *Talfourd* has explained *Thompson v. Maberly* correctly. The word *afterwards* there seems to mean that, if the tenant chose to hold on after the time named as certain, the first twelve months, then six months' notice should be necessary. We consider, therefore, that the notice in the present case was insufficient under the terms of the contract, which gives a term for a year, and so on from year to year. This is consistent with the doctrine laid down in *Birch v. Wright*, and with sound reason; for the language of the contract clearly contemplates a term longer than one year.

Rule absolute. (α)

DOE on the demise of WILLIS against ANN BIRCHMORE and Another.—p. 662.

In ejectment for rooms, it appeared that H. and the lessor of the plaintiff were placed in a house by the proprietor, whose servants they had been, and occupied it in distinct portions, H. having the rooms in question to himself. L. came to reside with and attend upon H., who died some time after, having devised his interest in the rooms to the lessor of the plaintiff. The original proprietor had died before H. L. continued to occupy the rooms, but was forcibly removed from one by the lessor of the plaintiff, and the ejectment brought for recovery of the others. The declaration being served upon L., defendants (who professed to have a claim under the original proprietor) entered into the consent-rule to defend as landlords, but, at the trial, gave no evidence of title in themselves.

Held that L. having come in under H., no title in him could be set up against the lessor of the plaintiff; that the lessor of the plaintiff showed a sufficient title, none being proved by the defendants; and that they could not allege against him that he did not prove twenty years' adverse possession in himself and H.

Held, also, that L. was not a competent witness for the defendants.

EJECTMENT for messuages, &c., in Surrey. Declaration of Trinity term, 1836. On the trial before TINDAL, C. J., at the Surrey Spring assizes, 1837, the following facts appeared on the plaintiff's case. The action was brought to recover possession of rooms in a house at Leatherhead. Mr. James Clear, a farmer, built the house in 1808, and, in that year or 1809, placed in it two of his servants, Hammond, and Willis, the lessor of the plaintiff. The house was divided into two parts having separate entrances; Hammond occupied one part, and Willis the other. No rent was paid. Clear died in 1814. Hammond con-

(α) "In case a lease be for a year, and so from year to year, as long as both parties shall please, that is a lease binding but for one year; but if the lessee, without countermand of the lessor, enter upon the second year, he is bound for that year, and so on: and if the lease be for a year, and so from year to year till six years expire, that is a certain lease for six years: also if it be made for a year, and so from year to year, as long as both parties agree, till six years shall expire, that is a lease for six years determinable at every year's end at the will of either party." Per Holt, C. J., in *Dodd v. Monger*, Holt, 416. S. C. 6 Mod. 215. It does not appear that this dictum was required by the case then before the Court; and a contrary doctrine seems to be now established in the case where a year is granted in the first instance, before the introduction of the words "from year to year." *Quære*, where the grant is "from year to year," in the first instance? See the cases cited, 4 Bac. Abr. *Leases and Terms for Years*, (L) 3, p. 836, et seq. 7th ed. *Sykes v. Dixon*, post, p. 693.

tinued in possession till 1821, when he died, leaving a will, (made in the same year,) by which he devised all his estate and interest in the house to Willis. Before Hammond's death, Charles Lee was brought into the house by Hammond, to reside with and take care of him, he being infirm. When Hammond died, Lee held possession of the rooms, three in number, which Hammond had occupied. Willis, about three years after Hammond's death, possessed himself forcibly of one of the rooms; and he afterwards brought this action for the other two. The declaration being served upon Lee, the defendants came in under the consent-rule, to defend as landlady and landlord. Evidence was given on their part of declarations made by Mr. Clear, showing his intention that Hammond and Willis should occupy the house only during his life, (or pleasure,) and that after his death his own wife should have it. She, however, did not outlive him. The defendants proposed to call Charles Lee: but it was objected that he, as the tenant in possession, had an interest in defeating Willis's title; and on this ground the witness was rejected. The defendants did not give any evidence of title in themselves. The Lord Chief Justice was of opinion that a sufficient case was made out to support the action, the defendants not showing any title; and he directed a verdict for the plaintiff, giving leave to move to enter a nonsuit. *Platt*, in the ensuing term, obtained a rule to show cause why a nonsuit should not be entered, or why there should not be a new trial by reason of the rejection of evidence.

Channell now showed cause. Lee was inadmissible. A tenant in possession has an interest which precludes him from giving evidence for the defendant: *Doe d. Jones v. Wilde*, 5 Taunt. 183, (1 E. C. L. R. 68.) [Lord DENMAN, C. J. The defendants will not dispute that, but will contend that Lee was a servant only, not a tenant.] He was in possession: the declaration in ejectment was served on him. The struggle on the part of the defendants was to maintain his possession: if they failed in the action, he would be turned out. TINDAL, C. J., says, in *Doe d. Teynham, v. Tyler*, 6 Bing. 390, (19 E. C. L. R. 111,) "The tenant in possession, in ejectment, could not be called to prove the title of the defendant under whom he claims to hold; nor could the landlord be called to prove the title of the tenant who defended the possession." Then, on the case as proved, no answer is given to the plaintiff's claim. Hammond and Willis occupied the house from 1808 downwards. Hammond died in 1821, devising all his interest to Willis. Lee had come in previously for the mere purpose of attending upon Hammond. He could have no right in the premises as against Hammond, and therefore none as against his devisee. As to the defendants, if they had shown any title derived by them from Clear, as heirs at law, or by devise, their case would have been different, though it could not have prevailed against a twenty years' adverse possession. But no title was proved on their part; they were mere strangers: the verdict therefore is right.

Platt and *Shee*, *contra*. To render a witness inadmissible, it must be shown that he has a legal interest in the event of the cause, not a mere bias. In *Doe d. Jones v. Wilde*, the witness came to prove a legal interest in himself as tenant; and in *Doe d. Lord Teynham v. Tyler*, the witness was to have supported an estate out of which his own was carved. Lee was called to establish a case which would have shown that he occupied only by permission. Willis had no pretence for treating Lee as his tenant. The defendants could not resist this action as

being themselves tenants: but, as the actual occupier acknowledged himself to hold merely in subordination to them, they, the owners of the land, though not properly his landlords, might come in under the consent-rule, availing themselves of the fiction of law which, in ejectment, lets in the party really interested to defend. It was as if ejectment had been brought against a servant left by his master to take care of a house: the master might defend as landlord; and could it be said that the servant was incapable of being a witness?

As to the case proved. A plaintiff in ejectment must recover on the strength of his own title. Willis came in by permission; and there was no evidence that that permission did not continue till the bringing of the action. It is contended that Lee would have had no title as against Hammond; but, assuming that to be so, Hammond is dead, and could not transmit any title by devise. And the defendants do not claim under Lee. [COLERIDGE, J. The defendants appear to have been strangers to the tenant, and had no right to come in under the landlord's rule.] If the lessor of the plaintiff relies on twenty years' possession, he must couple the holding by Hammond from the time of Clear's death in 1814 with the occupation after Hammond's death. But then the twenty years' possession ought to have been uninterrupted; and that does not appear to have been the case as to the rooms held by Lee. Willis did not enter upon any part of those rooms immediately on Hammond's death; and it does not appear that Lee ever acknowledged a holding under Willis. But, supposing that there was an uninterrupted possession, of which Willis might avail himself, from the death of Clear, that possession was not adverse to the right owner at the time when stat. 3 & 4 W. 4, c. 27, passed; and therefore, if Willis had been in full enjoyment of these premises, the owner might have brought ejectment against him within five years after the passing of the act, by sect. 15; *Doe dem. Burgess v. Thompson*, 5 A. & E. 532, (31 E. C. L. R. 390.) Besides, a party cannot, under the act, avail himself of a possession formerly enjoyed, but determined before the act passed; *Doe dem. Thompson v. Thompson*, 6 A. & E. 721, (33 E. C. L. R. 195,) and here Willis was out of possession of all the rooms now claimed, from the death of Hammond at least.

Lord DENMAN, C. J. The argument on the statute is inapplicable. The point as to adverse possession might have been raised as between the lessor of the plaintiff and the real owner; but here the defendants appear as strangers, who went to trial hoping to show a title paramount, but failed. Then the question is, whether the lessor of the plaintiff showed any title. Lee was in, whether as a tenant or as servant under Hammond, or his devisee, the lessor of the plaintiff, and could not set up title in himself as against either. The lessor of the plaintiff, then, had a prima facie title. Lee, if his evidence had been admitted, might have got rid of that: but it was objected that Lee could not be called, because he stood in the situation of a tenant in possession, and it was not competent to the defendants, who, on the evidence, were mere strangers, to deny that he was such tenant. The defence was a defence of his possession; if it failed, Lee would be turned out. It is as if notice to quit had been given to a coachman occupying a gentleman's stables, and a third person had undertaken, as the coachman's master, to defend the coachman's possession, but it had turned out that no relation of master and servant existed between them. Here, if Lee

had been servant to the defendants, his possession would have been theirs, and he could have had no personal interest in defeating the action; but it appears that he is in fact not their servant. Then, to get rid of the objection, they propose calling him to prove that he is their servant: but to insist on doing this is arguing in a circle.

LITTLEDALE, J. Suppose that Hammond, in his lifetime, had gone from the premises, leaving Lee there, and had afterwards returned, and demanded possession, and Lee had kept him out. In an action of ejectment against Lee, any proof of possession by Hammond, prior to that of Lee, would have entitled Hammond to recover: and his devisee is in the same situation. As against Willis, Lee had no right. Willis is not obliged to carry his title back twenty years; he claims as having had possession and the right to it. As to the question of evidence, Lee disclaimed any interest in the premises; and on that ground it was said he might be a witness, because the owner of the premises, in a case like this, might use the evidence of his servant residing on them. But it did not appear, without Lee's evidence, that he was servant to these defendants. If they had been occupiers of premises to which the rooms in question were an appendage, and had put Lee into them, the case would have been different: but nothing of that kind appeared; and, if the plaintiff recovered in this action, Lee would certainly be removed. The point is not quite clear; but I think he was properly rejected.

WILLIAMS, J. The act 3 & 4 W. 4, c. 27, does not apply. If Hammond had brought this ejectment against Lee, he must have recovered, and Willis and Hammond are identified. Then can the present defendants maintain the possession of Lee? It comes to the same question. It is in vain to say that the defendants do not treat Lee as a tenant; for, by the consent-rule, they say that he is so: and, if he could not have made good his possession against Hammond, neither can the defendants maintain it against Willis. They have treated him as the tenant in possession; and he must be considered as such tenant in the ordinary sense, and with reference to all the circumstances of the case.

COLERIDGE, J. I think that the Lord Chief Justice's ruling was right in both respects. Hammond was in possession; whether he had had an adverse possession for twenty years or not was a question entirely immaterial as between him and Lee, who came in by him. Hammond would have recovered in ejectment against Lee, in respect of the privity between them: and the case would have been the same if Willis had brought ejectment against Lee the day after Hammond's death. Otherwise, if I am devisee, and the devisor has left a servant on the premises who disputes the possession with me, I am bound to show the devisor's title; a proposition too monstrous to be contended for. Then do the defendants stand in any different position from Lee? They come in under the consent-rule; and therefore it is said the lessor of the plaintiff must show title. But that is a misunderstanding of the consent-rule, which was introduced by stat. 11 G. 2, c. 19, ss. 12, 13, with a view merely to the common case of landlord and tenant, and to prevent recoveries in fraud of the landlord. That provision, however, has been construed liberally, and extended so as to let in the heir, mortgagee, or devisee, in trust: but in each of those cases there is a privity between the party let in and the person, whether ancestor, mortgagor, or devisor, under whom the tenant claims. Where, however, the attempt has been to let in a person who, by this means, would throw upon the lessor of

the plaintiff an onus of proving title, which, as between him and the party let in, he ought not to be subject to, the rule has been discharged; or the party coming in has been precluded from setting up his own adverse title, and forced to stand in the same situation as the tenant in whose stead he appeared: *Doe dem. Knight v. Lady Smyth*, 4 M. & S. 347. (a) If this strictness were not observed, a party entering into the consent-rule might, though a stranger, put himself in the favourable position of disputing possession and obliging the adverse party to prove title. Applying these observations to the present case, it follows that, as Lee was on the premises in question by the permission of Hammond, the present defendants, who have no connection with Hammond, must stand in the same situation as Lee would. As to the point of evidence; Lee was served with the declaration as tenant in possession: the effect of the consent-rule is to let in another person to show that such possession was rightful. Can that be done by means of Lee? His title is defended in the action; if the defence fails he is turned out. In truth, he is called as a witness to support his own possession; and therefore he is clearly incompetent. If it were suggested that a declaration had been left with a servant as tenant in possession, in the absence of his master, the Court might probably, under such circumstances, if brought to their notice, hold that there had been no proper service; but this question is not raised.

Rule discharged.

(a) See *Doe dem. Buller v. Mills*, 2 A. & E. 17, (29 E. C. L. R. 16.)

The QUEEN against The Mayor of the Borough of EYE.

In the Matter of NEOBARD.—p. 670.

A householder is entitled to be on the burgess list of a borough, under stat. 5 & 6 W. 4, c. 76, s. 9, as an occupier, if he resides in his house but has let a room in the house to a tenant, who does not sleep there, and can be put out upon a week's warning.

And, where the mayor and assessors had expunged the name of such a party from the burgess roll, and the party in the term next following obtained a rule for a mandamus to the mayor to insert his name, the Court made the rule absolute, directing the mandamus to the mayor generally, though the mayor who expunged the name had ceased to be mayor before the rule nisi was obtained, and no application had been made to the present mayor, and though the year to which the list belonged had expired before making the rule absolute.

The mandamus to replace a name on the list, grantable under stat. 7 W. 4, & 1 Vict. c. 78, s. 24, is not peremptory in the first instance.

The tenant and occupier of a house underlet the cellar, which was beneath and had an internal communication with the house. The under-tenant used the cellar as a warehouse, and was separately rated to the poor for it. Held, that the tenant could not qualify as a burgess under stat. 5 & 6 W. 4, c. 76, s. 9, for the house independently of the cellar.

Two tenements, described as houses, were under the same roof, and opened upon a common passage and staircase. There was no outer door opening to the street; Held, that the rated occupier of one such tenement was qualified to be a burgess under stat. 5 & 6 W. 4, c. 76, s. 9.

ROGERS had obtained a rule in Michaelmas term, 1837, calling on the mayor of the borough of Eye, in Suffolk, to show cause why a mandamus should not issue, commanding him to insert the name of John Neobard in the burgess roll of the said borough.

The affidavit in support of the rule stated that Neobard, on 30th

August, 1837, and for three complete years immediately next preceding, had continually occupied a house within the borough, and during such occupation had been, and still was, an inhabitant householder residing in that house; that he had been rated for it to all poor rates, and had paid such rates, and all borough rates payable under stat. 5 & 6 W. 4, c. 76. The affidavit also negatived any disqualification of Neobard; and stated that his name, with the description of the house, &c., was in the overseer's list for the year to commence 1st November, 1837; that his claim was objected to; that, on the revision before John Manning, the then mayor, and the assessor, in October, 1837, it appeared, by Neobard's cross-examination, that he let one of the rooms of the house to a tenant at a yearly rent, but that the tenant did not sleep in the room; that Neobard could get rid of him at any time by giving a week's notice; and that there was an internal communication between the room let and the rest of the house, by means of a door opening into a passage in the house. The affidavit then stated that the mayor and assessors thereupon determined that the qualification was not proved to their satisfaction, and the mayor struck the name out of the list. That at the time of swearing the affidavit, (17th November, 1837,) John Clouting was mayor.(a)

The affidavits in answer stated that Neobard, on cross-examination, swore that the tenant was not a lodger. It also appeared, by an affidavit sworn 29th December, 1837, and re-sworn 3d January, 1838, that at those times John Clouting was mayor, and that no application had been made to him to insert the name of Neobard in the burgess list.

B. Andrews and Byles now showed cause. First, the burgess roll on which the applicant seeks to have his name enrolled is not in existence. [Lord DENMAN, C. J. We constantly make orders in the case of churchwardens, where a similar objection might be urged: if it could prevail, there would be unlimited license.] Stat. 7 W. 4 and 1 Vict. c. 78, s. 24, enables the Court, upon application as there directed, to inquire into the applicant's title, and order the mayor to insert his name on the roll; but then the party is entitled to vote and act only as if his name had been put on that burgess roll by the mayor and assessors. He can merely act as burgess for the year to which that burgess roll belongs. [Lord DENMAN, C. J. Wherever wrong is done, we shall always assume that it must be set right.] The present mayor is no party to the expunging of the name; nor has he any control over the roll in question; nor is he the party to whom application was made. [Lord DENMAN, C. J. The mandamus sought for is to be directed to the mayor of Eye; there is always a mayor.] Secondly, the applicant was not qualified under sect. 9 of stat. 5 & 6 W. 4, c. 76. He has not "occupied any house, warehouse, counting-house or shop" within the borough, but only part of a house. That section, indeed, does not use the word "actually," like stat. 1 W. 4, c. 18, s. 1, which was relied on in *Rex v. St. Nicholas, Rochester*, 5 B. & Ad. 219, (27 E. C. L. R.); (b) but the word "occupy" is material; and it is not satisfied by a partial occupation; otherwise a single house might give a qualification to as many persons as it contained rooms. The Court will support the finding of the mayor

(a) It was stated, in the course of argument, that Mr. Manning had died.

(b) See *Rex v. St. Nicholas, Colchester*, 2 A. & E. 699, (29 E. C. L. R.); *Rex v. St. Giles-in-the-Fields*, 4 A. & E. 495, (31 E. C. L. R.)

and assessors as to the fact unless it be manifestly against evidence, as in the case of a verdict.

Rogers, contra. First, as to the objection that the year for which the roll was made has expired. [Lord DENMAN, C. J. There is nothing in that objection.] The second question is, whether a householder who lets off a part of his house ceases to be occupier, for, as to Neobard having sworn that the tenant was not a lodger, that, on comparing the affidavits, clearly shows no more than that the tenant did not sleep in the house. *Rex v. St. Nicholas, Rochester*, was expressly decided on the word "actual," in 1 W. 4, c. 18, s. 1, which, the Court held, made constructive occupation insufficient. But under stat. 6 G. 4, c. 57, s. 2, where the word "actual" is not used, a constructive occupation, by living in part and underletting part, is sufficient; *Rex v. Ditcheat*, 9 B. & C. 176, (17 E. C. L. R.) The judgment of the majority of the Court in that case was confirmed in *Rex v. Great Bentley*, 10 B. & C. 520, (21 E. C. L. R.) The same point was expressly ruled, as to the qualification of voters for aldermen of London, under stat. 11 G. 1, c. 18, ss. 7, 8, in *Fludier v. Lombe*, Ca. K. B., Temp. Hardw. 307. Under the Irish Reform Act, stat. 2 & 3 W. 4, c. 88, s. 5, one qualification of electors for cities, being counties of cities or towns, is the holding or occupying, as tenant or owner, any house, warehouse, counting-house, or shop; and under this act it was decided in *Duigenan's Case*, 1 Alcock's Registry Cases Reserved, 114, by ten Irish judges against one, that a householder, who had let to a lodger part of a 10l. house, and occupied the remainder, which remainder was not worth 10l., had a right to vote. There CRAMPTON, J., who delivered the judgment of the majority, after citing *Phillips's Case*, 1 Alcock's Registry Cases Reserved, 20, used the following language. "The claimant must be the occupier of an entire house, and he must in contemplation of law be the sole occupier of that house; not that he must be a solitary resident therein, but that he alone occupies as owner or tenant, and that all the other residents are such only by his permission, and under his authority. The owner or tenant of the house, he who has the dominion over the outer door, who is the permanent possessor of the outer door, 'the householder,' and in that capacity liable to the payment of rents and rates, may be thus deemed to be the *legal occupier* of the whole house, though certain parts of the house are in *fact* occupied by *lodgers*. These are all but inmates of the house, more or less, under the control of the householder, and they are not occupiers within the statute. There can be but one occupier of a house, in the legal acceptation of the term, entitled to register. If indeed the letting to lodgers be of such a character as to make each tenement a separate house, it may be otherwise, as where a portion of a house is cut off from the residue, and provided with a separate entrance, with exclusive dominion over that entrance; but where the house (as here) is one house, there can be in legal language but one occupier; he must be the sole occupier; but he may occupy by himself, his family, and such inmates as he chooses to introduce in addition to his family."

Lord DENMAN, C. J. There can be no doubt whatever upon the question. The rule must be made absolute.

LITLEDAL, WILLIAMS, and COLERIDGE, Js., concurred.

Lord DENMAN, C. J., in answer to a question from counsel, said that

the rule must follow the terms of the rule nisi, and that the case must be considered to stand as at the time of obtaining such rule nisi.

“Ordered, that a writ of mandamus issue, directed to the mayor of the borough of Eye, in the county of Suffolk, commanding him to insert the name of John Neobard upon the burgess roll of the said borough.”

The QUEEN against The Same.

In the Matter of ROBERT LAIT.

A RULE nisi was also obtained in Michaelmas term, 1837, against the same mayor, for a mandamus, calling upon him to insert the name of Robert Lait in the burgess roll of the same borough.

B. Andrews and *Byles* now showed cause, and *Rogers* supported the rule. The objection to Lait's qualification was, that he had executed a conveyance, by bill of sale, of the house in respect of which he claimed. *The Court* was of opinion that the bill of sale did not, by its terms, convey the house from the assignor, and that his qualification was good. A peremptory mandamus was asked for on behalf of the prosecutor, and sect. 24 of stat. 7 W. 4 and 1 Vict. c. 78 was referred to, which enacts that it shall be lawful for a person whose name has been expunged to apply “before the end of the term then next following, to the Court of King's Bench for a mandamus” to insert his name, “and thereupon for the Court to inquire into the title;” and, “if the Court shall award such mandamus,” the mayor shall be bound to insert the name, &c. [Lord DENMAN, C. J. The mandamus there meant must be a mandamus in the usual form, calling for a return. It would be very inconvenient for the Court to try the question on affidavits.] If the act does not give a peremptory mandamus in the first instance, a party whose name is expunged must almost always fail of having it restored during the year. The revision taking place in October, he cannot move for a mandamus till the Michaelmas term; and, if the return gives rise to an issue in fact, the trial, if at the assizes, cannot take place till the Spring, and then there may be questions of law raised, which, when there is much business before the Court, cannot for a long time be disposed of; and, until final judgment on the whole record, there can be no peremptory mandamus: *Regina v. Baldwin*, 8 A. & E. 947, (35 E. C. L. R.) [LITTLEDALE, J. We cannot make the state of business before the Court a reason for our decision on this point.] There have been instances in which a mandamus has issued immediately, in the case of an annual office. [Lord DENMAN, C. J. Even in such cases, though we often grant the writ in the first instance, it is not a peremptory mandamus.]

Per Curiam.

Rule absolute for a mandamus,
(as in the preceding case).

The QUEEN against The Same.

In the Matter of UNGLESS.

A RULE nisi had been obtained as in the two preceding cases. The objection to the prosecutor's qualification was, that he had not occupied, and been rated for, any house, &c., according to stat. 5 & 6 W. 4, c. 76, s. 9. The material facts, as they appeared on the prosecutor's

affidavit in support of the rule were, that, in December, 1835, "this deponent let ~~to~~ his son, William Henry Ungless, a cellar which was underneath the house in respect of which this deponent had been and still is rated as aforesaid, and also that there was an internal communication between the said house and cellar, and that the said W. H. Ungless occupied and used the said cellar as a warehouse, and was rated to the poor of the said borough and parish of Eye in respect thereof."

B. Andrews, with whom was *Byles*, now showed cause. Ungless underlet part of the house; and did not continue to occupy that part. His son was not a lodger, but occupied the cellar apart as a warehouse. Even if the occupation was the father's, he has not been rated for the cellar.

Rogers, contra. This is not like the ordinary underletting of a room. The house and cellar are the subjects of a several and independent occupation, the one as a dwelling, the other as a warehouse. The prosecutor, therefore, was the occupier of a perfect house, putting the cellar out of consideration. It is as if there were stables communicating with the residence by a covered passage; the house would not the less be an entire house because it had that addition. No difficulty arises here as under the settlement acts, 59 G. 3, c. 50, 6 G. 4, c. 57, and 1 W. 4, c. 18, because the words "separate and distinct," which are material under those statutes, do not occur in stat. 5 & 6 W. 4, c. 76, s. 9. [COLERIDGE, J. Do you say that it would make any difference if the undertenant occupied the cellar as a dwelling, or slept and took his meals at the stables? Can the nature of what the householder retains be altered by the use made of what is separated?] In either case the householder would be rated, and qualify, in respect of the house. [COLERIDGE, J. Then you would say the same if the ground floor were occupied as the cellar is here, or as the stables are supposed to be.] If it were let as chambers, the case would be the same. If the internal communication connected all the parts as one house, it would be otherwise. But here the parts are used for entirely distinct purposes. *Rex v. Great and Little Usworth and North Biddick*, 5 A. & E. 261, (31 E. C. L. R.,) is a stronger case than this. [COLERIDGE, J. If the ground floor were let to a person who used it as a warehouse, and the second to a person who used it as a shop, would the third still be a house?] Under the circumstances relied upon here, it would.

Lord DENMAN, C. J. It is very difficult to say that, after the letting of this cellar, a complete house was still left, notwithstanding the internal communication. If we were to decide so I do not know where we should stop; and a great encouragement would be given to the splitting of votes. The rule must be discharged.

LITTLEDALE, WILLIAMS, and COLERIDGE, Js., concurred.

Rule discharged.(a)

The QUEEN against The Same.

In the Matter of EVANS.—p. 679.

THIS was a similar application. The prosecutor claimed in respect of a house: the objection was that he occupied only part. It appeared by the prosecutor's affidavit that "the house so occupied by deponent

(a) See *Rex v. Henley upon Thames*, 6 A. & E. 294, (33 E. C. L. R.)

as aforesaid adjoined another house, each house being under the same roof, and which said other house had been for the last three years and upwards previous to the last day of August, 1837, and still is, unoccupied; and that there was an entrance to the said houses by means of a passage into which the doors of each of the said houses opened, both on the right and on the left, and that there was also but one staircase to the said houses, which, in case the said other house had been occupied, would have been used by the tenant thereof in common with deponent to get to their respective sleeping rooms." He was rated to the poor in respect of the premises so occupied by him.

B. Andrews, with whom was *Byles*, now showed cause, and contended that the premises on each side of the passage formed only parts of one house, not resembling chambers, because neither tenant had any outer door of his own.

Rogers, contra. A tenement is not the less a dwelling-house because it opens upon a common passage or common staircase; *Rex v. Bailey*, Moody's C. C. 23. [LITTLEDALE, J. If there be no landlord residing in a house, half a dozen different persons may be stated to have dwelling-houses within it.] Kitchen on Courts Leet, &c., 92,(a) tit. *Inmates*, is one of the authorities showing what the older law was on this subject. [LITTLEDALE, J. It does not appear by the affidavits here that there was any outer door opening to the street. Lord DENMAN, C. J. The doors opening on a common passage made no difference. COLERIDGE, J. The passage was no more than part of the street.]

Per Curiam,

Rule absolute.

(a) Jurisdictions; or, The Lawful Authority of Courts Leet, &c., 5th ed.

The QUEEN against HOOKER.—p. 680.

Quo warranto information for exercising a borough office. The ground of prosecution was, that the officers presiding at the election were not qualified. Defendant pleaded that he was duly elected. Pending the information, stat. 7 W. 4 & 1 Vict. c. 78, passed. Prosecutor thereupon moved for a stay of proceedings, and payment of costs (down to the passing of the act) by defendant, under sect. 20.

Rule absolute, although defendant suggested that he had a defence independent of the statute (not, however, specifying its nature), and offered to pay all costs of the trial if he failed in establishing such defence.

In Hilary term, 1836, a rule was made absolute for a quo warranto information against the defendant, for exercising the office of a councillor of Ipswich.(a) He pleaded several pleas, of Trinity term, 1836, alleging, in substance, that he was, on December 26th, 1835, duly elected. While the information was depending, July 17th, 1837, the royal assent was given to stat. 7 W. 4 & 1 Vict. c. 78, to amend stat. 5 & 6 W. 4, c. 76. The ground of the present information being that the bailiffs before whom the defendant was elected were not good returning officers, the relator, in Michaelmas term, 1837, obtained a rule to show cause why the proceedings should not be stayed, and costs paid to him, according to stat. 7 W. 4 & 1 Vict. c. 78, s. 20. The affidavit in support of the rule stated that, as the relator was advised, the statute having now

(a) See *Rex v. Brame*, 4 A. & E. 664, (31 E. C. L. R.) in which a rule for a quo warranto against the mayor was made absolute at the same time, and under the same circumstances.

passed, the election was made valid, and the act (a) would be an answer to any further proceeding on his part.

Ogle now showed cause. The act ought not to be held compulsory on defendants if they think that they have a defence independent of sect. 1, (b) and do not wish for a stay of proceedings. If the case goes to trial, and the defendant fails on the merits, the costs now claimed will not be lost; and the relator will recover, not only those, but the costs of trial, which the judge will perceive to have been incurred by his not now availing himself of the statute. The defendant is willing that the rule should be discharged on condition of his paying all costs of the trial, if he fails in establishing a defence independent of the act.

Kelly and *O'Malley*, contra. If it appeared, on a trial, that the objection was cured by statute, the judge would not, by reason of any arrangement between the parties, go into a long inquiry as to merits which would have become immaterial. [COLERIDGE, J. If the judge said, "this is an idle question, and I will not try it," would that entitle you to costs?] It would not. And the defendant does not even suggest by his affidavit what defence he has, independent of the statute. If any hardship results, it is the act of the legislature; and, if individuals suffer, defendants in general are benefited. The words of sect. 20 exclude any option on their part. The relator, here, applies in proper time, and is entitled to relief, according to *Regina v. W. Roberts*, 7 A. & E. 441.

Lord DENMAN, C. J. You ask for costs only down to the passing of the act; and that application is within the authority of *Regina v. W. Roberts*. The rule must be absolute.

LITTLEDALE, WILLIAMS, and COLERIDGE, Js., concurred.

Rule absolute.

(a) Sect. 1.

(b) The defendant put in an affidavit setting out his pleas, but not stating the particular nature of his defence.

The QUEEN against HARRISON GORDON CODD, Esquire.—p. 682.

When an order has been made on a putative father for the payment of a sum named so long as the bastard is chargeable, a magistrate, under stat. 49 G. 3, c. 68, s. 3, is bound to enforce the order by commitment, on proof that the sum is in arrear and the child chargeable; and he has no jurisdiction to inquire whether the sum is too large, or whether it is likely to be all applied to the maintenance of the child.

By an order of two justices of Middlesex, 21st May, 1831, James Woodard was adjudged the reputed father of a bastard child, then chargeable, and likely to continue chargeable, to the parish of St. John, Hackney, and was ordered to pay the parish officers 13s. towards the maintenance of the child to the time of making the order, and 7s. weekly thenceforward, so long as the child should be chargeable to the parish; the mother to pay 6d. weekly, so long as the child should be chargeable, in case she should not nurse and take care of it. The child continuing chargeable, the churchwardens and overseers expended 7s. weekly towards its maintenance. Woodard reimbursed them a part: but, on 30th October, 1837, he was in arrear 15l.; and he was thereupon, under warrant of a justice of Middlesex, brought before the defendant, who was the sitting magistrate at Worship Street Police Office, on 16th November, 1837, to answer the churchwardens and overseers

for his refusal to pay. On the hearing it was proved that the 15*l.* had been expended, and was owing from Woodard. Woodard refusing payment, the defendant was required to commit him for three months, with hard labour, unless he should sooner pay. Mr. Codd refused then to do so, but proposed to do it, if the guardians of the poor of the Hackney union (under whose management the poor of the parish were placed) would take the child from the mother and place it in the union work-house, and, after deducting from the 7*s.* the expense of the maintenance of the child, place the residue for its benefit in a savings bank. The mother refused to part with the child; and the guardians of the union declined to take it from her. This was communicated to Mr. Codd, who then refused to commit Woodard. The only excuse offered by Woodard before the magistrates was that 7*s.* a week was more than was necessary to be paid by him towards the maintenance of the child, and that the mother had borne an illegitimate child twelve years before.

On affidavit of the above facts, *Platt*, in Hilary term, 1838, obtained a rule nisi for a mandamus commanding Mr. Codd to apprehend and commit Woodard to be kept to hard labour for three months, unless he sooner paid the money.

The defendant, in answer, made affidavit that it appeared to him that the 7*s.* was expended generally in support of the mother and two bastards, and not solely or necessarily upon the child now in question; that, upon Woodard alleging this, Mr. Codd called upon the overseers and guardians to show that the money was expended on the bastard named in the order: and that an assistant overseer of the parish thereupon swore that the money was paid over to the mother without requiring from her any account or voucher except her receipt. That the mother was then sworn; and that, upon her evidence (which was set forth), Mr. Codd was not satisfied that the money was expended on the bastard named in the order.

Erle now showed cause. No statute authorizes the exacting from a putative father more than is necessary for the maintenance of the child. Sect. 3 of stat. 49 G. 3, c. 68, enacts that, when such putative father is brought before a justice for not paying money pursuant to an order of maintenance, the justice shall commit the party, if he shall not pay such sum "as shall appear" to the justice to be due, "or shall not show to such justice some reasonable and sufficient cause for not so doing." Properly nothing is due which is not requisite for the maintenance: and the facts here show that the allowance ordered by the two magistrates covers expenses beyond the maintenance, and beyond what is requisite for that purpose. The other side must contend that the magistrate, when called on to commit, has no power to inquire into the application of the money. That was not the intention of the act. The policy of stat. 18 Eliz. c. 3, s. 2, was, in this respect, similar to that of stat. 49 G. 3, c. 68, s. 3, and of stat. 4 & 5 W. 4, c. 76, s. 76.

Platt, contra, was stopped by the Court.

Lord DENMAN, C. J. There is no reasonable doubt on this point. The putative father is to obey the order as long as the child is chargeable to the parish. If he chooses to pay less than is ordered, then, if that payment makes the child not chargeable, the order will not take effect. I do not think that the magistrate, who is called on to commit, can inquire whether the sum mentioned in the order be or be not too large: and there would be no end to the inquiry, if he had to ascertain

whether the whole sum ordered had gone to the maintenance of the child. One might perhaps wish that there were some way of putting an end to the order when the relief ceased to be necessary: but it would be wrong in this Court to take such a power on itself.

LITLEDALE, J. The order, while it is in force, must be obeyed.

WILLIAMS, J., concurred.

COLERIDGE, J. In effect, this is an attempt to repeal the order.

Rule absolute

The QUEEN against PECK and Others.—p. 686.

A count for conspiring to deceive and defraud divers of her Majesty's subjects, who should bargain with defendants for the sale of goods, of great quantities of such goods, without making payment, remuneration, or satisfaction for the same, with intent to obtain profit and emolument to defendants, (not stating the conditions,) is as not showing that the conspiracy was for a purpose necessarily criminal.

But it is no objection that the count does not name the parties who were to have been defrauded.

A count charging that defendants, being indebted to divers persons, conspired to defraud them of the payment of such debts, and in pursuance of such conspiracy executed a false and fraudulent deed of bargain and sale and assignment of certain goods from two of themselves to a third, with intent thereby to obtain emolument to themselves, is bad for omitting to show in what respect the deed was false and fraudulent.

ERROR from the Borough Court of Quarter Sessions, Liverpool. Indictment for conspiracy. The first count stated that the defendants, Thomas Philip Peck, Joseph Peck, and Samuel Peck, "falsely, unlawfully, and wickedly did conspire, combine, confederate, and agree amongst themselves to deceive and defraud, and to cause and procure to be deceived and defrauded, divers of her Majesty's liege subjects, who should bargain with the said Thomas Philip Peck, and Joseph Peck for the sale of goods and merchandize, of great quantities of such goods and merchandize of the said subjects, of great value, to wit 2000*l.*, without making payment or other remuneration or satisfaction for the same, with intent to obtain and acquire to the said Thomas Philip Peck, and Joseph Peck, and Samuel Peck divers sums of money and other profit and emolument; to the evil example," &c., and against the peace, &c. Second count: that the said T. P. Peck, J. Peck, and S. Peck, on, &c., at, &c. ("they the said T. P. Peck and J. Peck having heretofore been, and then and there being, in partnership trade together; and being then and there indebted to divers persons in divers large sums of money," to wit, 10,000*l.*), "falsely, unlawfully, and wickedly did conspire, combine, confederate, and agree amongst themselves to deceive and defraud the said creditors of them the said T. P. Peck and J. Peck of payment of their said debts. And the jurors," &c., present "that the said T. P. Peck, J. Peck, and S. Peck afterwards, to wit, on," &c., at, &c., "in pursuance of and according to the said conspiracy, combination, confederacy and agreement amongst themselves had, falsely and unlawfully and wickedly did make and execute, and cause and procure to be made and executed, a certain false and fraudulent deed of bargain and sale and assignment of certain fixtures, stock in trade, and good will, of great value, of and belonging to the said T. P. Peck and J. Peck, by and from the said T. P. Peck and J. Peck, to the said S. Peck, for divers false and fraudulent considerations, with intent thereby to obtain and

procure to the said T. P. Peck, J. Peck, and S. Peck divers sums of money and other emolument, to the great damage of the said creditors, to the evil example," &c. The defendants were convicted. The writ of error was argued in this term. (*a*)

Murphy, for the defendant. The indictment is too uncertain. An indictment must be so far precise that the party may know what charge he has to answer, and may be able to plead his acquittal or conviction upon it to a future indictment on the same facts: 4 Hawk. P. C. p. 29, Book 2, c. 25, s. 59, 7th (Leach's) ed., (vol. ii. p. 312, Curwood's ed.) Several instances are there given of charges which are too general, as "having spoken divers false and scandalous words against J. S. being mayor of such a place;" or that defendant was a "common defamer," "common conspirator, and such like." So, in sect. 71, (p. 38, of the same book,—page 319, Curwood's ed.,) it is said that "those general indictments which anciently seem to have been allowed for suffering divers bakers to bake, &c., against the assize, &c., or for distraining divers persons without cause, &c., have by the later authorities been holden insufficient for their uncertainty in not naming some persons in particular who were so suffered to bake, or distrained." *Rex v. Roberts*, 1 Show. 389; *Rex v. Gibbs*, 1 Stra. 497; *Rex v. Gilbert*, 1 East, 583; *Rex v. Robe*, 2 Stra. 999, are also instances of improper generality. If the indictment charges an offence committed against persons who cannot be known, it should state that they are unknown to the jurors; *Rex v. Gibbs*. In *Rex v. Gill*, 2 B. & Ald. 204, which may be cited for the Crown, the indictment was held good, because it showed a completely formed conspiracy to cheat certain individuals who were named, though it did not state the means by which the conspiracy was to be carried into effect. [COLERIDGE, J. Here is a conspiracy stated, to defraud future customers.] The indictment should have added, "to the jurors unknown." [COLERIDGE, J. They were not known to any body at that time.] If the indictment does not set out any overt acts, it should at least show that the conspiracy was to effect something by specific means, which were illegal, as by false pretences. That was done in *Rex v. Gill*. The indictment in *Rex v. Fowle*, 4 Car. & P. 592, (19 E. C. L. R. 540,) charged that the defendants had conspired "to cheat and defraud the just and lawful creditors" of Fowle; and Lord TENTERDEN held the count "much too general," saying, "It does not state what was intended to be done, or the persons to be defrauded." In the present case, the conspiracy may have been merely not to pay debts. And, as the indictment does not charge a conspiracy to do any thing criminal in itself, it ought to show some subsequent overt act amounting to an offence; *Rex v. Seward*, 1 A. & E. 706, (28 E. C. L. R. 185.) All that appears here is a combination to get goods without payment, for the purpose of gaining by them. [LITLEDALE, J. A conspiracy to defraud is stated.] The words, it is true, are "to deceive and defraud" "divers of her Majesty's liege subjects," "of great quantities of such goods:" but, as other words are added, the context must be looked to; and that is "without making payment" for the same. It is consistent with the allegations, that the defendants may have endeavoured to get the goods to sell on commission. The conspiracy itself, therefore, is not shown to have been criminal. In *Rex v. De Berenger*, 3 M. & S. 67, the indictment, which was held good, set forth

(a) January 28th. Before Lord Denman, C. J., Littledale, Williams, and Coleridge, Ja.

a conspiracy to procure certain results, by means which it was unlawful to use, whether they took effect or not; and the names of the persons to be effected were not material. It was said by BAYLEY, J., that, in such a case, "the conspiracy is the thing which constitutes the crime." Here, the conspiracy itself is not a crime; the criminality, if any, would result from the manner in which the conspiracy was carried into effect upon the persons who were its objects. The doctrine generally received that, in conspiracy, the gist of the offence is the conspiring, as it is stated in 2 Hawk. P. C. 119, book I, c. 72, s. 2, 7th ed., (vol. i. p. 444, Curwood's ed.,) seems properly referable to the class of conspiracies defined in stat. 33 Ed. 1, stat. 2. It has been suggested, as to naming parties, that future customers, being unknown, could not be named; but at least the parties mentioned in the second count, to whom T. P. Peck and J. Peck were already indebted, might have been specified. The charge in the second count, of making a fraudulent deed, imputes no offence; for it is not stated that the object was to defraud the creditors.

Cottingham, contra. The indictment contains, in substance, a charge of conspiracy to defraud. In *Rex v. Seward*, 1 A. & E. 713, (28 E. C. L. R. 189,) Lord DENMAN, C. J., says, "An indictment for conspiracy ought to show, either that it was for an unlawful purpose, or to effect a lawful purpose by unlawful means," (a) [Lord DENMAN, C. J. I do not think the antithesis very correct.] Here the indictment sufficiently alleges an offence, in the part charging a conspiracy; and a statement of unlawful means is not necessary. In *Rex v. Eccles*, (b) the indictment was for conspiring by indirect means to prevent H. B. from exercising the trade of a tailor. It was objected that the means ought to have been specified: but Lord MANSFIELD said, "The conspiracy is stated, and its object: it is not necessary that the means should be stated." And BULLER, J., added, "If there be any objection, it is that the indictment states too much: it would have been good certainly if it had not added, 'by indirect means;' and that will not make it bad." Here, if the first count is good independently of the words "without making payment," those needless words will not prejudice; *Rex v. Phillips*, 3 Camp. 75. *Rex v. De Berenger*, shows that the conspiracy is that which constitutes the crime, and that the offence is complete when there is a complete concert to bring about the illegal purpose. The language of BAYLEY and DAMPIER, Js., is strong on this point. So also are the judgments of ABBOTT, C. J., BAYLEY, and HOLROYD, Js., in *Rex v. Gill*, 2 B. & Ald. 204. *Rex v. Fowle*, 4 Car. & P. 592, (19 E. C. L. R. 540,) was not a precisely similar case to this; Lord TENTERDEN there did not absolutely decide that the indictment was bad; and the sufficiency of it became ultimately immaterial, because the defendants were acquitted. If the first count here were bad for the reasons alleged, the second is sufficient, for that states an unlawful act done in pursuance of the conspiracy.

Murphy, in reply. The indictment in *Rex v. Biers*, 1 A. & E. 327, (28 E. C. L. R. 98,) was held bad, though it contained a count (brought to the notice of the Court in argument) averring that the defendants conspired "by divers false, artful, and subtle stratagems and contri-

(a) See also *Rex v. Jimes*, 4 B. & Ad. 349, (24 E. C. L. R. 71.)

(b) Note (d) to *Rex v. Turner* 13 East 230, S. C. 1 Leach C. C. 274.

vances, as much as in them lay to injure, oppress, aggrieve, and impoverish E. W. and T. W., and to cheat and defraud them of their monies." In *J. Anson v. Stuart*, 1 T. R. 748, it was held an insufficient justification of a libel calling plaintiff a swindler, to plead that he had been "guilty of deceiving and defrauding divers persons, with whom he had had dealings." Much of the reasoning of *ASHHURST* and *BULLER*, Js., there, is applicable to this case. *Rex v. Hamilton*, 7 Car. & P. 448, (32 E. C. L. R. 579,) shows what information the prosecutor may be reasonably expected to give in a count for conspiracy; and the first count there, which *LITTLEDALE*, J., held to be a proper one, stated a conspiracy to obtain goods by false pretences, &c., from persons named. Whatever might have been the effect of the first count in this case independently of the words "without making payment," those words, being inserted, cannot be overlooked.

Cur. adv. vult.

LORD DENMAN, C. J., now delivered the judgment of the Court. After reading the first count of the indictment, his Lordship said,

It is objected that this count does not state what particular creditors the defendants meant to defraud. But we are of opinion that there is nothing in this. If the offence went no farther than the general conspiracy, it could not be known what particular persons would fall into the snare. But we think that the count is defective in not stating, with sufficient particularity, what the defendants conspired to do. It states that they conspired to deceive and defraud divers of her Majesty's subjects who should bargain with them for the sale of goods, of great quantities of such goods, without making payment or other remuneration or satisfaction for the same. Now, obtaining goods without paying is, as *Mr. Murphy* argued, not necessarily a fraud: the words might apply to the obtaining goods to sell on commission. Therefore we are of opinion that that count is bad. We also think that the second count is defective for a like reason. It alleges that the defendants, in pursuance of the conspiracy there mentioned, did make and execute a false and fraudulent deed of bargain and sale, with intent thereby to obtain emolument for themselves: but it does not state in what respect the deed was false and fraudulent; and therefore we have only the prosecutor's general opinion upon this point, not the facts on which it is founded. The judgment must be reversed.

Judgment reversed. (a)

(a) See *Rex v. Richardson*, 1 M. & Rob. 402.

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SYKES against DIXON.—p. 693.

B. contracted in writing to work for plaintiff in his trade, and for no other person, during twelve months, and so on from twelve months to twelve months, until B. should give notice of quitting.

Held, that such agreement was invalid under stat. 29 C. 2, c. 3, s. 4, for want of mutuality.

And that this objection might be taken by the defendant in an action by plaintiff for harbouring B., who, as plaintiff alleged, had quitted him without proper notice.

CASE. First count, for harbouring William Bradley, the plaintiff's servant, who had unlawfully left his service. Second count, for enticing W. B., the plaintiff's servant, to quit him without leave. Pleas. 1. Not Guilty. 2. That W. B. was not plaintiff's servant. Issues thereon. On the trial before ALDERSON, B. at the Yorkshire Spring Assizes, 1837, it appeared that, on August 17th, 1833, William Bradley (mentioned in the declaration) signed the following agreement with the plaintiff.

"Memorandum of an agreement made the 17th day of August, 1833, by which I, William Bradley, of Sheffield in the county of York, do agree that I will work for and with John Sykes of Sheffield aforesaid, manufacturer of powder flasks and other articles, at and in such work as he shall order and direct, and no other person whatsoever, from this day henceforth during and until the expiration of twelve months, and so on from twelve months' end to twelve months' end until I shall give the said John Sykes twelve months' notice in writing that I shall quit his service."

(Signed by Bradley only.)

Blackburne, for the defendant, objected that this agreement was invalid under sect. 4 of the statute of frauds, 29 Car. 2, c. 3, as showing no consideration for the promise by Bradley, inasmuch as the plaintiff was not bound by it to the performance of any duty towards him; and he cited *Lees v. Whitcomb*, 5 Bing. 34, (15 E. C. L. R. 357.) The learned Judge reserved leave to move to enter a nonsuit on the objection.

It appeared that Bradley served the plaintiff two years under the agreement, and continued serving him, without any fresh contract, during a third year, but that at the expiration of that year he left the plaintiff and went into the defendant's service. After the expiration of the first two years, Bradley had given the plaintiff a notice of his intention to quit the service. The sufficiency of the notice was disputed on the ensuing argument in this Court: but, as the judgment did not turn upon it, no further statement on the subject is necessary. The jury found a verdict for the plaintiff on the first count, and for the defendant on the second. In Easter term, 1837, *Baines* obtained a rule nisi for entering a nonsuit. In the present term, (a)

Cresswell and *Hoggins* showed cause. It is contended on the other side that Bradley's contract with the plaintiff was not to be performed within one year from the making; and, therefore, by sect. 4 of stat. 29 Car. 2, c. 3, cannot be enforced unless there was a valid agreement in writing. But, first, this is not a case within the statute. The original agreement was for two years certain, which expired in August, 1836; afterwards, and when this action accrued, Bradley was serving

(a) January 22d. Before Lord Denman, C. J., Littledale, and Williams, Ja.

only from year to year. That subsequent service might have been indefinitely continued; but sect. 4 of the statute does not attach merely because the engagement may possibly extend over more than one year. It may be inferred from *Boydell v. Drummond*, 11 East, 142, that the prolongation must be distinctly contemplated. Supposing, here, an imperfect agreement for two years, under which the parties have acted, there might afterwards be a valid unwritten contract for a continuance of the service from year to year; and the former agreement might be looked at to ascertain the terms, so far as they had been reduced to writing, upon which the parties meant to go on. The consideration for Bradley's service, which does not appear in the written instrument, might, under the yearly contract, be added by parol. It is as if a tenant had been let into premises under an irregular demise, and had continued to hold, after the contemplated term, without further stipulation: the instrument of demise would be looked to for the terms of the continued holding; and, if it did not specify a rent, the unwritten agreement of the parties might supply that defect. The objections to this contract are, first, that it is void for want of mutuality. It is true, that the agreement was signed only by Bradley; but the statute requires only the signature of the party to be charged. *Laythourp v. Bryant*, 2 New Ca. 735, (29 E. C. L. R. 469,) decides this point. It will be said that nothing is stipulated on the plaintiff's part, by way of consideration for Bradley's service; and *Lees v. Whitcomb*, 5 Bing. 34, (15 E. C. L. R. 357,) will be cited: but the reasons given by the three learned Judges for their decision in that case do not entirely agree; BEST, C. J., seems to rest his on the ground of variance; and GASELEE, J., expresses a doubt. [Lord DENMAN, C. J. The action there was between the master and servant.] And in the present case, if the written agreement only were looked to, the law would imply a promise by the master to pay wages, and a quantum meruit would lie for them. That being so, Bradley should have given notice according to the written contract, ending with the year: not having done so, he was still servant to the plaintiff when he joined the defendant. (The argument as to notice is omitted; *Beeston v. Collyer*, 4 Bing. 309, (13 E. C. L. R. 444;) and *Williams v. Byrne*, 7 A. & E. 177, (34 E. C. L. R. 74,) were cited.) Even if the contract here was invalid, a third person cannot take advantage of the defect: it is a sufficient answer to the defendant, that Bradley was the plaintiff's servant de facto; *Barber v. Dennis*, 1 Salk. 68; *Keane v. Boycott*, 2 H. Bl. 511.

Raines and Ogle, contra. Bradley was not even servant de facto to the plaintiff. The original agreement was, in effect, for two years certain; *Birch v. Wright*, judgment of BULLER, J., 1 T. R. 378; *Denn dem. Jacklin v. Cartwright*, 4 East, 29; (a) 4 Bac. Abr. 836, tit. *Leases and terms for Years*, (Ls) (7th ed.); therefore it required a regular memorandum in writing; and the written instrument here produced, not being conformable to the statute, is a nullity, and cannot be referred to for any purpose. In the cases of landlord and tenant which have been referred to, a new tenancy has been held to commence on the terms of the former holding, but not till those terms have been recognised on the part of the tenant, as by payment of the rent. Here the servant professed to treat the agreement for two years as a nullity. It may be that the instrument did not require the signature of both

(a) See *Doe dem. Chadborn v. Green*, ante, p. 233.

parties; but at least it should have expressed both the promise by one and the consideration moving from the other. In *Lees v. Whitcomb*, 5 Bing. 34, (15 E. C. L. R. 357,) BURROUGH, J., distinctly founds his judgment on the want of an expressed consideration. The true construction of stat. 29 Car. 2, c. 3, s. 4, is, that an agreement not drawn up in the manner there prescribed is absolutely void; *Birkmyr v. Darnell*, 1 Salk. 27; *Carrington v. Roots*, 2 M. & W. 248. In the latter case a distinction was suggested between sect. 4 of the Statute of Frauds and sect. 17, but without success; and the whole Court held that the contract, not being made conformably to sect. 4, was void. This case, therefore, differs from *Keane v. Boycott*, 2 H. Bl. 511, where the contract which the defendant sought to impeach was voidable only. And here, if the contract was merely voidable, Bradley had exercised his option of avoiding it when the defendant received him. On the want of mutuality, *Young v. Timmins*, 1 Cro. & J. 331. S. C. 1 Tyr. 226, is a direct authority. It is indeed suggested that a consideration on the master's part, namely, payment, may be inferred from the terms of this agreement. [Lord DENMAN, C. J. I do not see how we can infer that as a consideration for his confining himself to the one employer, because any person with whom he worked would be obliged to pay him.] It is contended on the other side that, assuming this contract to be void by the statute, a third party cannot take advantage of it; but *Rex v. Hipswell*, 8 B. & C. 466, (15 E. C. L. R. 267;) *Rex v. Gravesend*, 3 B. & Ad. 240, (23 E. C. L. R. 61;) *Smith v. Birch*, 1 Bott, 509, pl. 628, 6th ed., and *Gye v. Felton*, 4 Taunt. 876, show the contrary. Where indeed the master sues for an injury done to his servant, the defendant cannot allege that the contract between those parties is null; but here the servant himself sought to take advantage of the nullity. On the plea of Not Guilty, the scienter is a material part of the issue; *Thomas v. Morgan*, 2 Cro. M. & R. 496. S. C. 5 Tyr. 1085: and can it be said here that the defendant knew Bradley to be the plaintiff's servant? [Lord DENMAN, C. J. All we can assume on the subject is, that Bradley told the defendant the truth. Then the question is whether or not, under the circumstances, the contract was actually void, not what Bradley's opinion may have been.]

Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the Court. There were two pleas in this case, on which issue was joined; Not Guilty; and that William Bradley was not the plaintiff's servant. To prove that Bradley was servant, a contract was put in, the operation of which was entirely on one side. It bound Bradley to serve the plaintiff, and no other person, for a specified time, and not to leave the service without giving twelve months' notice. After the stated time had expired, Bradley gave notice, to which the plaintiff objected. Bradley afterwards left the service. We think that the agreement put in was no contract of service; for it was altogether on one side. Bradley was to serve one person only; but that one was not bound to employ him. It was contended, for the plaintiff, that a promise must be implied, on the master's part, to pay Bradley for his labour; but that would be the same in any service to which Bradley might engage himself: it is no consideration for this contract. Then it was argued, on the authority of *Keane v. Boycott*, 2 H. Bl. 511, that the objection was not one which a third person could take; and that might be so in a case where

the servant was de facto continuing in the service ; but not here, where he had quitted his master, and taken his chance in hiring himself to the defendant.

Rule absolute.

In the Matter of Arbitration between ROBERT GREENWOOD and JONATHAN and ANTHONY TITTERINGTON.—p. 699.

Where arbitrators are empowered to choose an umpire, and having differed in their nominations, make the appointment by lot, and then inform the litigating parties "that they have mutually chosen" A. B. to be umpire, and the parties thereupon assent to the choice, neither party is bound by such acquiescence, if given in ignorance of the real state of facts.

An award was set aside on motion, it appearing by the affidavits that a communication was made as above, and the choice assented to ; but it not appearing whether the parties assenting (and one of whom now objected) knew at the time of such assent, how the appointment had taken place.

Cresswell, in Michaelmas term, 1838, obtained a rule to show cause why the award made between these parties should not be set aside, on the ground, among others, that the umpire was not properly appointed. The submission to arbitration was by agreement, giving power to two arbitrators, Whitaker and Postlethwaite, to appoint an umpire, who was to be chosen before proceeding to hear evidence. At the first meeting of the arbitrators, Whitaker named one umpire and Postlethwaite another ; and the choice between them was decided by ballot. It appeared by the affidavits in opposition to the rule that, before proceeding to further business, the arbitrators informed the parties "they had mutually chosen Mr. Edward Atkinson to be umpire ;" and the parties approved of such choice. The award was made by the umpire and one of the arbitrators.

Alexander now showed cause. The choice of an umpire by lot does not invalidate the award in this case, because it must be inferred, from the statements before the Court, that the litigating parties understood what had been done. The contrary is not suggested by the affidavits in support of the motion. The rule on this subject is to be collected from the cases of *Ford v. Jones*, 3 B. & Ad. 248, (23 E. C. L. R. 51 ;) *In the Matter of Tunno and Bird*, 5 B. & Ad. 488, (27 E. C. L. R. 107 ;) *In the Matter of Jamieson and Binns*, 4 A. & E. 945, (31 E. C. L. R. 231.)

Cresswell, contra, was not heard.

Lord DENMAN, C. J. The presumption, at all events, is against the election of an umpire by lot. Such a transaction should at least be fully explained. It should appear that each arbitrator exercised his judgment on the fitness of the person to be balloted for, and that the parties knew of the course about to be adopted. Here it is not clear that the parties had that advantage, or that each of the arbitrators knew both the persons proposed as umpires. The litigating parties, it appears, were told that the arbitrators had chosen Atkinson ; but that, if implying that they had exercised their judgment, might be a complete misrepresentation.

LITTLEDALE, J. In a case which came before me lately in the Bail Court, (a) I examined all the previous decisions, and considered it established that the nomination of an umpire ought to be matter of choice, not of chance, unless the parties consent to an appointment by lot ; and

(a) Probably *In the Matter of Hodson and Drewry*, 7 Dowl. P. C. 569.

that the confidential clerks of the attorneys were not competent to bind their principals and the parties by such a consent. I agree in the general principle that, unless there be a clear consent, the nomination by chance is wrong. The rule must be absolute.

WILLIAMS, J. I am of the same opinion. The assent was given on the supposition that the arbitrators had done their duty and exercised a discretion.

COLERIDGE, J. The assent, given in ignorance, was no assent. The parties were told that the arbitrators had exercised a choice: that was very different from their being informed, as the fact was, that each had had an opinion against one of the proposed umpires. In the case *in the Matter of Tunno and Bird*, 5 B. & Ad. 488, (27 E. C. L. R. 107,) the party moving against the award had given his assent with full knowledge of the intended mode of appointment.

Rule absolute.

Sir JACOB ASTLEY, Baronet, against JOY.—p. 702.

A certificate for full costs, under Reg. Gen. Hil. Vac. 4 W. 4, *Directions to taxing officers*, where a cause is tried before a judge and less than 20*l.* recovered, must be given by the judge himself; and if, from an unavoidable cause, as the judge's death, it cannot be obtained from him, the Court cannot direct it to be entered on the *postea*. Although the cause was referred at nisi prius to an arbitrator, who, on giving his decision, stated that it was fit to be tried by a judge.

THIS was an action for a balance of rent, &c. The cause came on for trial before PARK, J., at the last Norfolk assizes; and, after it had been partly heard, a verdict was taken for the plaintiff, and the cause referred to a barrister, to certify as to the amount of damages. The arbitrator certified for a sum below 20*l.* He also (at the request of the plaintiff's agent) certified that the cause was a proper one to be tried by a judge. The plaintiff then endeavoured to obtain a similar certificate from PARK, J., in order that the costs might be taxed on the usual scale, according to Reg. Gen. Hil. Vac. 4 W. 4, *Directions to taxing officers*, &c.; (a) but the learned Judge was too ill to give the certificate, and continued unable to do so till his death.

Byles now moved that the Court would direct a certificate to be entered on the *postea*. He contended that the rule on this subject, being established, not by statute, but only by regulation of the Court, might be varied from, to the extent now required; and he cited *Nokes v. Frazer*, 3 Dowl. P. C. 339, and *Broggreff v. Hawke*, 3 New Ca. 880. [Lord DENMAN, C. J. Did the order of reference here give the arbitrator power to certify as to the fitness of the cause to be tried by a judge?] That does not appear; nor did it in *Nokes v. Frazer*. [COLERIDGE, J. There the certificate was given by the judge before whom the cause came on for trial.] The Court here will supply the defect of power in the arbitrator in the same way.

Lord DENMAN, C. J. There is no warrant for this application. In

(a) 5 B. & Ad. xix. (27 E. C. L. R.) By that rule, where the sum recovered, in assumption, &c., shall not exceed 20*l.* without costs, the plaintiff's costs shall be taxed according to a reduced scale. "Provided that in case of trial before a judge of one of the superior courts, or judge of assize, if the judge shall certify on the *postea* that the cause was proper to be tried before him, and not before a sheriff or judge of an inferior court, the costs shall be taxed upon the usual scale."

Nokes v. Frazer, 3 Dowl. P. C., 339, the certificate was given by the judge of assize, who had seen the pleadings and heard the opening of the case. He desired to have the arbitrator's opinion; but it does not appear that he acted solely upon that. Here there can be no exercise of opinion whatever by the judge.

LITTLEDALE, J. We have nothing to proceed upon here, but the arbitrator's opinion. No power was delegated to him to certify on this subject.

WILLIAMS, J., concurred.

COLERIDGE, J. I am of the same opinion. If we could do what is asked here, the same application might be made to a judge by whose order a cause is referred. Rule refused. (a)

(a) See *Hallen v. Smith*, 7 Dowl. P. C. 394.

The QUEEN against DODSON and Others.—p. 704.

A party may be convicted, under the general clause, sect. 24, in stat. 7 & 8 G. 4, c. 30, of having wilfully and maliciously damaged growing wood, to the value of 6*d.*, though sect. 20 expressly imposes a penalty for unlawfully and maliciously damaging such wood, "the injury done being to the amount of 1*s.* at the least."

The proviso of sect. 24, exempting from the penalty there imposed any person acting under a reasonable supposition of right, does not oblige justices to dismiss a charge made under that section, upon the mere statement of the accused party that he so acted; but, in default of proof by him, they may judge, from all the circumstances, whether or not the party did so act.

It is no proof of a *bonâ fide* claim subsisting, that several parties, other than the individual charged, have committed similar trespasses, using the same colour of right as that which he professes to rely upon, and that the complainants have obtained injunctions from the Court of Chancery against such parties.

So held on motion for a criminal information against magistrates who had convicted as above.

In discharging a rule for such information, the Court refused to order payment of costs by J. S., who appeared to have instigated the trespasses in question, and had employed an attorney to defend the persons charged with such trespasses, (including the party making the present application;) J. S. not having sworn an affidavit or otherwise taken a direct part in obtaining the rule.

Nor would they make such order upon the attorney, who had neither made an affidavit nor otherwise acted in obtaining the rule; although affidavits in support of the rule were sworn by his clerks; and although on the hearing of an information for one of the above-mentioned trespasses, (but not that immediately in question,) he had publicly uttered words, not warranted by his professional duty, encouraging persons present to commit similar trespasses.

IN Michaelmas term, 1838, a rule nisi was obtained for a criminal information against the Reverend Nathaniel Dodson and others, justices of Berkshire, for misdemeanour, under the following circumstances.

William Keen, of South Hinksey, in the county of Berks, labourer, was charged, by information before the above-mentioned justices in petty sessions (November 1st, 1838), with having, at Bagley Wood, in the same county, "wilfully and maliciously" committed "damage, injury, and spoil to certain underwood, the property of the president and scholars of St. John Baptist College, in the University of Oxford, then and there growing, whereby the same was then and there injured to the amount of 6*d.*, against the form of the statute," &c., 7 & 8 G. 4, c. 30. Wagner, clerk to Thomas Frankum, of Abingdon, an attorney of this court, attended the petty sessions (November 5th) with Keen, as his professional adviser. Wagner protested against the jurisdiction of the justices, alleging that Keen had acted under a fair and reasonable supposition that he had a right to cut the underwood for estovers and fire-

bote. The case was, however, gone into, and witnesses called, who proved that Keen had cut down a whitethorn and a maple. They stated, on cross-examination, that many persons had been cutting underwood in certain open parts of Bagley Wood, and that, when interfered with by the servants of the college, they said they were "trying for their rights." It appeared that several of these persons acted on the same assumption of right as Keen. The college had obtained injunctions from the Court of Chancery against a great number of these parties, (of whom Keen was not one,) to restrain them from cutting underwood in Bagley Wood. Keen produced no witnesses in defence; but Wagner, on his behalf, again urged that the information ought to be dismissed, there being a bona fide claim of right, which was under litigation in the Court of Chancery. Keen was, however, convicted of having committed damage as charged by the information, to the amount of 6*d.*, and was committed to the House of Correction for non-payment of that sum and costs. In his affidavit made in support of the present rule, he stated that he claimed a right, in respect of his ancient dwelling-house, to cut and carry away, from a certain common or open part of Bagley Wood, furze, underwood, &c., without stint, to be used in his said dwelling-house for fuel or repairs, and that he committed the alleged trespass in exercise of such right. The affidavits also stated that the claim of such right by the inhabitant householders of South Hinksey and other places adjacent to the wood must have been well known to Mr. Dodson, since he had, during the last six months, heard several informations against such persons for exercising the alleged right. The affidavits did not set forth any fact (except as above stated) from which the alleged right was deduced. The principal ground of the present application was, that the justices had corruptly, and against the statute, convicted Keen. There were some other suggestions of misconduct, on which no question of law arose.

The affidavits in opposition to the rule set forth the evidence, by which it appeared that the wood was cut by moonlight, between six and eight in the evening of October 30th: and that Keen was remonstrated with by servants of the college, but committed the acts of trespass after such remonstrance. The affidavits further stated that the justices, after hearing the evidence, asked Keen if he had any witnesses to establish "a fair and reasonable right" in him to cut the wood, and offered to hear such witnesses. That the president and scholars of St. John's had been seised and possessed of the whole of Bagley Wood for two hundred years last past, subject only to certain rights of common of pasture: that, in 1819, some inhabitants of cottages in South Hinksey, &c., having claimed a right of cutting estovers or firebote in the wood, and having cut the underwood in exercise of such alleged right, the president and scholars brought an action against them; that the right was pleaded in justification, and in 1820 the cause was tried and the plaintiffs obtained judgment: that from that time till 1837 the rights of the college were (except in some trifling instances) acquiesced in: that since 1837 the trees, underwood, &c., of the wood had been carried away, damaged, and destroyed to a much greater extent than could have been requisite even for the estovers and firebote claimed, and by other persons than those for whom the claim was made, and that the wood so cut had been sent to Oxford and Abingdon for sale, or other disposal: and that the injunctions before mentioned had been obtained, from time

to time, as offenders were discovered, for the purpose of preserving the college property in the wood, and preventing extensive depredations therein, not only by persons claiming, but by persons not pretending to, right of estovers and firebote: that none of these injunctions was directed to Keen, because, at the time when they were sued out, it did not appear that he had committed any trespasses: that, between 1837 and the proceeding against Keen, the justices against whom the present application was made had heard many informations against persons charged with cutting the wood, and convicted the defendants; that none of those parties, as far as the justices knew, had taken any legal measures to establish their alleged rights; and that, at the time when the information against Keen was heard, the destruction of the wood was proceeding to a ruinous extent. The magistrates, in their affidavits, denied having been actuated by any improper motive.

It was further suggested, by the affidavits against the rule, that the trespasses had been renewed since 1837 at the instigation of Frankum and of one Thomas Pratt,^(a) who had been several times convicted of trespasses in the wood, and had threatened to send a hundred people to cut there: that, on one occasion in particular, (August, 1838,) a procession of persons, with ribands and music, headed by Pratt, had brought a wagon, laden with sticks from the wood, into Abingdon, and exchanged a part of the load for beer: that, in all the cases which had come before the magistrates respecting the wood, Frankum, by himself or his clerk, had attended professionally on behalf of the persons charged, and had been instructed by Pratt: and that, on one such occasion, (September, 1838,) when the magistrates had adjourned the hearing, Frankum had declared aloud, in the court, that the parties charged should (or would) as soon as they left the court, go into the wood and cut again. There were also affidavits stating that Pratt and Frankum had come to the house of correction in which Keen was confined, paid the damages and costs for which he was detained, and at the same time produced to him notices of the present motion, addressed to the justices, which he signed at Pratt's and Frankum's request; from which, and the other facts, it was inferred that they had induced him to make this application. Neither Pratt nor Frankum made any affidavit in support of the rule; but there were affidavits on that side by two persons who were clerks to Frankum. In this term,^(b)

Sir *J. Campbell*, Attorney-General, Sir *W. W. Follett*, and *Bayley*, showed cause. The magistrates had jurisdiction, under stat. 7 & 8 G. 4, c. 30; for, although the case was not within sect. 20,^(c) the "injury done" not "being to the amount of 1s.," sect. 24 is not so limited, and includes this as well as all other injuries to "any real or personal property."^(d) And the jurisdiction here is not taken away by the clause

(a) See *In the Matter of Pratt*, 7 A. & E. 27, (34 E. C. L. R.)

(b) January 14th. Before Lord Denman, C. J., Littledale, Williams, and Coleridge, Js.

(c) Stat. 7 & 8 G. 4, c. 30, s. 20, enacts, "That if any person shall unlawfully and maliciously cut, break, bark, root up, or otherwise destroy or damage the whole or any part of any tree, sapling, or shrub, or any underwood, wheresoever the same may be respectively growing, the injury done being to the amount of 1s. at the least, every such offender, being convicted before a justice of the peace," shall forfeit, &c., (a sum not exceeding 5*l.*); and on a second conviction shall be liable to imprisonment and hard labour, and on a third conviction shall be deemed guilty of felony, &c.

(d) Stat. 7 & 8 G. 4, c. 30, s. 24, enacts, "That if any person shall wilfully or maliciously commit any damage, injury, or spoil to or upon any real or personal property whatsoever, either of a public or private nature, for which no remedy or punishment is hereinbefore provided, every such person, being convicted," &c., shall forfeit, &c., (a sum

of sect. 24 in favour of persons acting under a reasonable supposition of right. The assertion of legal claims was a pretence. A mere allegation before the justices that a right is claimed ought not to oust them of jurisdiction: if Keen could have adduced evidence of such a right, or of any reasonable ground for supposing that he had it, the opportunity of doing so was offered him; but he gave no such proof, nor is any now given on affidavit. In Paley on Convictions, (a) after stating that "where the title to property is in question, the exercise of a summary jurisdiction by justices of the peace is ousted," the author adds, "The rule, however, ought not to be so extended, as to enable an offender to arrest the summary jurisdiction of the justice by a mere fictitious pretence of title. An assertion of right, therefore, is not to be regarded, where it evidently appears that no colour or pretext for it exists." So in *Rez v. Wrottesley*, 1 B. & Ad. 648, (20 E. C. L. R.), it was held that, on complaint before justices of non-payment of church-rate, the jurisdiction was not taken away by a mere assertion that the party disputed the validity of the rate. Assuming even that the justices here had done wrong, it does not follow that the Court would grant a criminal information against them. And the rule should be discharged with costs to be paid by Pratt and Frankum. Pratt is evidently the person employing Frankum, and has been guilty of barratry and maintenance in the transactions before the Court; and, in such a case, according to the observation of Lord ABINGER, C. B., in *Hayward v. Giffard*, 4 M. & W. 194, a person not formally a party to the proceedings may be subjected to costs. At any rate, the Court may exercise that authority over Frankum, who is one of its attorneys, and has gone out of the line of his professional duty in these disputes. *Rez v. Barron*, 3 B. & Ald. 432, (5 E. C. L. R.,) where this Court discharged a rule for a criminal information against a magistrate, with costs to be paid by the attorney, was not so strong a case as the present.

Erle and *F. V. Lee*, contra. First, the justices had no jurisdiction. Sect. 20 of stat. 7 & 8 G. 4, c. 30, is the clause which meets this case. Sect. 24 applies only to "damage, injury, or spoil," "for which no remedy or punishment is hereinbefore provided." [LITLEDAL, J. Sect. 24 extends to cases not provided for by sect. 20; for it inflicts a penalty if any person shall "wilfully or maliciously" commit damage, &c.; sect. 20 applies only to damage done "unlawfully and maliciously."] At any rate, the proviso of sect. 24 includes this case. If there had been no previous user of the alleged right, and Keen had been found cutting the wood by moonlight, the magistrates, on hearing the information, might not have been bound to allow that he acted under a claim of right merely because he said so. But here the party did the act openly, asserting his claim at the time; and the right advanced by him had been maintained in an action some years before; and there had been some attempts to use it subsequently. The injunctions obtained ex parte decide nothing; but they show that a litigation is depending, the result of which may possibly be an issue to try this very right. The present case, therefore, comes within the rule stated in Paley on Convic-

not exceeding 5l.) "Provided always, that nothing herein contained shall extend to any case where the party trespassing acted under a fair and reasonable supposition that he had a right to do the act complained of, nor to any trespass, not being wilful and malicious, committed in hunting," &c., "but that every such trespass shall be punishable in the same manner as before the passing of this act."

(a) Pp. 54, 57, 8d ed., by Deacon.

tions, p. 54, 3d ed., that where title to property is in question, the summary jurisdiction is ousted; and resembles the Anonymous case mentioned in p. 59, note [1.] of the same work, where the Court granted a rule nisi for a criminal information against a magistrate who had convicted under such circumstances. Supposing this rule to be dismissed, Pratt and Frankum cannot be subjected to costs, not being parties to the application: and, if this were otherwise, the Court would not take a step against Frankum calculated to intimidate persons exercising the duty of attorneys.

Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the Court. After stating the points discussed, his Lordship said,

We think that the justices undoubtedly had jurisdiction, because the proceeding was under sect. 24 of stat. 7 & 8 G. 4, c. 30, and not under sect. 20; and under sect. 24 damage to the amount of only 6*d.* warrants a summary conviction. As to the claim of right, the magistrates exercised their judgment, as they were entitled to do, and were of opinion that the act in question was not done in the bona fide exercise of what the party supposed to be his right. It appears that in 1820 this alleged right was set up by parties in the situation of Keen; and, on a trial bringing it into question, the president and scholars obtained a verdict. That decision was acquiesced in for some time; but, last year, new trespasses were begun. Injunctions were obtained against some of the parties, and they desisted; but others continued trespassing, and injunctions were obtained against them also; and at this period Keen appears for the first time to have done the acts which were complained of before the justices. An extensive mischief was going on; and the magistrates were of opinion that the cutting of the wood by Keen was done when he did not believe that he had any right, and for the purpose of exciting others to do the same. The magistrates, in the course of the proceedings before them, repeatedly asked what right could be shown, and received no answer. The decision in favour of the college on this subject had been notorious; but nevertheless the trespasses were renewed and spoliation persisted in. There must be some limit to such a course. It appears that great quantities of the wood were taken, carried in procession in a riotous manner, and bartered for beer; and there is great reason to think that Pratt, who had been more than once convicted of trespasses in the wood, excited these proceedings. The magistrates who heard the information against Keen were empowered to form their judgment on these circumstances: and it is impossible to say that they were wrong in pronouncing the act complained of to be a pertinacious trespassing. They deny any improper motive; nor indeed is this strongly imputed.

The rule must, therefore, be discharged, and, being applied for against magistrates, with costs. It was contended that Pratt should be liable for these; but, he not being a party to the rule, we cannot so visit him. There is no authority for such a proceeding. Then as to Frankum: his conduct was extremely blameable, particularly at the time when, upon the magistrates adjourning a case, he said, in the presence of a number of persons, that the people charged with trespass would go back to the wood and help themselves. We think, however, that the magistrates might have vindicated their own authority on that occasion: Frankum has not been called upon to answer this matter; and it happened at a different time from that to which the present application relates. Upon

the whole, therefore, we are of opinion that these parties should not be called upon for costs upon the present rule. The rule will be discharged with costs, but without any special order as to the payment.(a)

Rule discharged with costs.

(a) See *Regina v. Thomas and Philp*, 7 A. & E. 608, (34 E. C. L. R.)

The QUEEN against The Trustees of SWANSEA Harbour.—p. 713.

This case is reported, 8 A. & E. page 439.

The QUEEN against The Recorder of BATH.

MARSHFIELD against LYNCOMB and WIDCOMB.—p. 714.

An overseer is not competent, by stat. 54 G. 3, c. 170, s. 9, or otherwise, to give evidence for his parish on the trial of an appeal against an order of removal; whether the evidence be tendered on the merits, or on a preliminary point, as service of notice.

At the October quarter sessions for the city and borough of Bath, 1838, an appeal came on to be heard, against an order of justices removing John Marchant from the parish of Lyncomb and Widcomb, in the said city and borough, to the parish of Marshfield, in the county of Gloucester. The appellants called one of their own overseers to prove their notice of appeal; but the respondents objected to him as incompetent by reason of his office; and, the recorder holding the objection good, the appeal was dismissed. In last Michaelmas term a rule nisi was obtained for a mandamus to the recorder, to enter continuances and hear the appeal. In this term,(a)

Kinglake showed cause. First, the overseer was inadmissible, if considered only as a nominal party to the appeal; *Bauerman v. Radenius*, 7 T. R. 663. Stat. 54 G. 3, c. 170, s. 9, enacts that persons who are inhabitant rate-payers, and parish officers, shall not, by reason thereof, be incompetent as witnesses in the cases there specified: but that does not let in actual parties. Before the statute, rate-payers were inadmissible, as being substantially parties; *Rex v. Kirdford*, 2 East, 559, *Rex v. Woburn*, 10 East, 395, *Rex v. Hardwick*, 11 East, 578; and overseers were incompetent on the same account, and not by reason of their office: they do not, therefore, as officers, derive any new capacity from the statute. [Lord DENMAN, C. J. The witness here came to prove a notice of appeal. Is there any authority for a distinction, as to competency, between witnesses called to prove a preliminary point, and those called for other purposes?] There is none. The proof is essential to the case, as giving the Court jurisdiction. The overseers are not merely nominal parties to the appeal; for, by stat. 4 & 5 W. 4, c. 76, s. 82, if the appeal is decided against their parish, they are individually liable in the first instance for the costs: and, although they may reimburse themselves, that primary liability creates a sufficient interest to disqualify;

(a) January 29th. Before Lord Denman, C. J., Littledale, Williams, and Coleridge, Ja.

as where executors and trustees have been held incompetent by reason of their legal liability to costs, though having no private interest in the suit: 1 Stark. on Ev. 136, 2d ed. [LITTLEDALE, J. It might depend on circumstances whether they would be allowed the costs in their account.] Stat. 54 G. 3, c. 170, s. 8, vests all securities for the maintenance of bastards in the overseers, and empowers them to put the security in suit. Could the overseer be a witness in an action by himself on a bastardy bond? The officers mentioned in sect. 9 are not to be deemed incompetent witnesses by reason of their holding office, in any matter relating to "the allowance of the accounts of any officer" for the district, parish, &c. Could an overseer, by virtue of this section, give evidence in a matter relating to his own accounts? In *Heudeboure v. Langton*, 3 Car. & P. 566, (14 E. C. L. R.,) (a) Lord TENTERDEN, in deciding on the admissibility of inhabitants under the statute, distinguished between persons who were merely inhabitants, and persons who had become personally liable for the costs of the cause. *Rex v. The Governors, &c., of the Poor of St. Mary Magdalen Bermondsey*, 3 East, 5, is nearly in point. There, by a local act, directors of the poor were to sue and be sued in the name of their treasurer, and to be indemnified out of certain specified funds; on appeal against rates made by them, the sessions were to award costs to the party appealing or appealed against; and it was enacted that any inhabitant of the parish, though paying rates, might, upon any trial, &c., concerning the execution of the act, be deemed a competent witness. This Court held that, on appeal against a rate made by the directors, they themselves were not competent to give evidence at the trial, being liable individually in the first instance for the costs, and being parties to the suit. Secondly, the recorder of the borough had not jurisdiction to try this appeal. (b) [The Court desired to hear counsel for the appellants on the first point, before proceeding upon this.]

Shee, contra. Stat. 54 G. 3, c. 170, s. 9, expressly enacts that no inhabitant of a parish, or person "executing or holding any office thereof or therein," shall be incompetent in the cases specified. Overseers must have been contemplated by the legislature in framing this clause. The enactment as to costs, stat. 4 & 5 W. 4, c. 76, s. 82, evidently has in view a liability to be imposed on the parish, not on the individual officers. In *Rex v. The Governors, &c., of the Poor of St. Mary Magdalen Bermondsey*, the local act provided in terms that the directors should be sued, and that they should be indemnified. They were primarily liable. But, under sect. 82 of stat. 4 & 5 W. 4, c. 76, the justices are to order the *parish* to pay costs; the overseers are not liable in the first instance, unless as treasurers; and, although the amount may be recovered from them "in the same manner as any penalties or forfeitures are by this act recoverable," that is only in case of perverseness in them; if, on production of the magistrates' certificate, they "refuse or neglect to pay." In *M'Gahey v. Alston*, 2 M. & W. 206, which was an action in the name of the vestry clerk of St. Pancras on a bond given to the directors of the poor of that parish, a director, as having no personal interest, but being merely manager of a public fund, was held to be a good witness for the plaintiff, on the authority of *Fletcher v. Greenwell*, 1 Cro. M. & R. 754, S. C. 5 Tyr. 316. [LITTLE-

(a) S. C., but not this point, M. & M. 402, note (b), (22 E. C. L. R.)

(b) See *Regina v. St. Lawrence, Ludlow*, Michaelmas term, 1839.

DALE, J. In *Fletcher v. Greenwell*, the witness was not a party on the record. COLERIDGE, J. In *M'Gahey v. Alston*, the plaintiff was examined; but he was expressly made competent by a local act, stat. 59 G. 3, c. xxxix., local and personal, public, s. 16.] In practice, overseers have constantly been called to prove notices of appeal. [COLERIDGE, J. Their declarations have been given in evidence, and the objection not taken, that they themselves might be called as witnesses.] In *Weller v. The Governors of the Foundling Hospital*, 1 Peake N. P. C. 206, 8d ed., governors, though parties to the record in a corporate capacity, were held to be good witnesses, because they had no personal interest, but were mere trustees. In *Withnell v. Gartham*, 1 Esp. N. P. C. 322, a trustee was held competent on the same principle. The overseers in this case have no more interest than the witnesses who were held admissible in those. [Lord DENMAN, C. J. The point is of great consequence. My impression is, that these preliminary facts have been proved by overseers without objection. Perhaps the late act may make some difference. We will look into this point before considering the other.] *Cur. adv. vult.*

Lord DENMAN, C. J., now delivered the judgment of the Court. The question in this case was, whether the Recorder of Bath was right in rejecting the evidence of an overseer called by an appellant parish, of which he was the officer, to prove their notice of appeal. The objection was, that his situation, as a party to the appeal, disqualified him from being a witness. There is no statute which gives competency to a person so situated. I had some doubt whether, on a preliminary matter, he might not be admissible; but we think that no distinction can be taken in that respect. The Recorder, therefore, was right in rejecting the witness. Rule discharged.

DOE on the demise of THOMAS EVANS against DAVID EVANS and Others.—p. 719.

Tenant by demise to him and his heirs for lives devised as follows, (after legacies of money and furniture:) "I give, bequeath, and devise to my wife A. *all my money, securities for money, goods, chattels, and estate and effects* of what nature or kind soever, and wheresoever the same may be at the time of my death." And I appoint my said wife executrix. The heir at law was not mentioned in any part of the will.

Held, that by the word "estate" the residue of the term passed to the widow.

Although it was contended that, by a covenant in the lease, such a disposal of the term would cause a forfeiture; on which point the Court gave no opinion.

EJECTMENT for messuages, land, &c., in Carmarthenshire. On the trial before COLERIDGE, J., at the Carmarthen Spring assizes, 1837, it appeared that the lessor of the plaintiff claimed as eldest son and heir at law of Daniel Evans; the defendants, under a devise by Ann Evans, widow of the said Daniel.

Daniel Evans held the premises in question (a farm) under a lease thereof, granted by John Bartlett Allen to him and his heirs for certain lives, which were not extinct when this action was brought. The premises were described as a messuage, tenement, and lands with the appurtenances. The lease contained a covenant by Daniel Evans, "that he the said D. E. and his heirs shall not nor will not at any time during the said term sell, alien, assign, or transfer this indenture of lease or the

premises hereby demised, or any part thereof, or his or their estate and interest herein, for all or any part of the said term, without the leave or licence in writing of the said John Bartlett Allen, his heirs and assigns, for that purpose first had and obtained." And there was a proviso that, if Daniel Evans or his heirs should, during the term, sell, alien, or transfer, &c., (as above,) without the leave, &c., the lease, and the term thereby granted, should cease, determine, and be void, and it should be lawful for the lessor, his heirs, &c., to re-enter.

Daniel Evans, being in possession under the above lease, made his will as follows. "I give and bequeath to my son John Evans the sum of 50*l*. I give and bequeath to my daughter Margaret Evans the sum of 50*l*. I give and bequeath to my son David Evans the sum of 50*l*. And my will and meaning is, that the said several sums of 50*l*. each be paid to them respectively when they attain the age of twenty-one years or day of marriage. Also I give and bequeath" (bequest of household furniture to the said John, Margaret, and David, to be provided for them by the executrix after-named, on their attaining twenty-one, or marrying.) "Also I give, bequeath, and devise unto my beloved wife, Ann Evans, all my money, securities for money, goods, chattels, and estate and effects, of what nature or kind soever, and wheresoever the same may or shall be at the time of my death. And I do nominate, constitute and appoint my said wife sole executrix of this my last will and testament, subject to my funeral expenses, the above legacies, and all my just debts, hereby revoking," &c. (revocation of all former wills.) "In witness," &c.

Ann Evans survived Daniel Evans, continued in possession, devised the lands now in dispute, and died. The question was, whether or not these lands had passed to her by Daniel Evans's will. A verdict was taken for the plaintiff, with leave to move to enter a nonsuit or a verdict for the defendants. In the ensuing term a rule nisi was obtained according to the leave reserved.

Evans and E. V. Williams now showed cause. Thomas Evans, as the heir at law of Daniel, was special occupant under the lease, unless Daniel's will divested him of that title. It is contended on the other side that the word "estate" in that will carried the freehold property; and in some cases it has that effect. In 2 Powell on Devises, 158—179, 3d ed. the authorities on the subject previous to that publication are collected and commented upon. The context of the will must be looked to; and here it restrains the operation of the word "estate," the other expressions of the will relating solely to personalty, and the heir at law being entirely passed over. Among the cases which give the rule of construction under these and similar circumstances, are *Timewell v. Perkins*, 2 Atk. 102; *Roe dem. Helling v. Yeud*, 2 New Rep. 214; *Doe dem. Spearing v. Buckner*, 6 T. R. 610; *Doe dem. Andrew v. Lainchbury*, 11 East, 290; *Doe dem. Hurrell v. Hurrell*, 5 B. & Ald. 18, (7 E. C. L. R. 8;) *Galliers v. Moss*, 9. B. & C. 267, (17 E. C. L. R. 375;) and *Doe dem. Bunny v. Rout*, 7 Taunt. 79. S. C. 2 Marsh, 397, (2 E. C. L. R. 32;) in which case many of the previous authorities are reviewed. There, it is true, the term "estate" did not occur, the material words being "every other thing, my property;" but this raises no important distinction. In 2 Powell on Devises, 160, the author says, (adverting to this among other decisions:) "It deserves observation, that in the three last cases, in which the words 'estate' and 'property' were confined to personal estate, in consequence of the *society* in which they were found,

the will was altogether silent as to land, there being no preceding devise or mention of it; a circumstance which, though not conclusive, was relied upon in those cases, and has generally been considered as having weight in the exclusion of real estate, by demonstrating that the testator had not property of that species in his contemplation when he made his will." The testator here was not likely to overlook the estate in question when disposing of his property; and there was nothing to account for the omission of his eldest son, unless he supposed that that son would take the farm which he himself then held. [COLERIDGE, J. In moving for this rule, *Jongsma v. Jongsma*, 1 Cox, 362, was cited, where a devise to executors of all the testator's "goods, estates, bonds, debts, to be sold," and applied as in the will mentioned, was held by Sir LLOYD KENYON, M. R., to pass copyhold.] That case, and *Tiddy v. Simms*, 1 Cox, 362. S. C. (as *Tilley v. Simpson*) note (b) to *Fletcher v. Smiton*, 2 T. R. 659, there cited by the Master of the Rolls, appear to have been decided on the ground that all the personalty was disposed of by other words of the will, and therefore the word "estate" was useless unless it meant land. But the repetition, in wills, of terms meaning the same thing, is too frequent to be the ground of any such argument. "Estate" may or may not pass the realty, according to circumstances. In *Wilkinson v. Merryland*, Cro. Car. 447. 449, the testator, being tenant in fee of lands in A., and holding a mortgage in fee of other lands, devised the lands in A. to J. S., and "all the rest of his goods, chattels, leases, estates, mortgages, debts, ready money, plate, and other goods whereof he was possessed," to his wife, after his debts and legacies paid, and made his wife executrix. It was held that the words "estates, mortgages," &c., did not give the wife a fee in the mortgaged lands, and that after her death the heir of the testator might recover them against the wife's devisee. [LITLEDAL J. Would that be so decided now?] The case was treated as authority in *Gulliers v. Moss*, 9 B. & C. 267, (17 E. C. L. R. 375.) In *Cliffe v. Gibbons*, 2 Ld. Ray. 1324, Lord Chancellor COWPER says, that "where a man devises all his estate, goods and chattels, and no mention had been made before in the will of lands of which the testator was seised in fee, a fee simple will not pass: but where a real estate is mentioned before in the will, and then such words follow, a fee passes." Here the word "estate" comes between "chattels" and "effects," and cannot be taken to enlarge what precedes, as it might if placed after every other description of the subjects of devise. Some cases have been decided on this subject since the last edition of Powell, (1827.) Of these, *Wilce v. Wilce*, 7 Bing. 664, (20 E. C. L. R. 280,) where a fee was held to pass, turned on the manifest intention of the testator to devise all his property. Here it is probable that the testator did not mean to devise the residue of the term, conceiving that he was bound to leave his heir special occupant. In *King v. Shrives*, 10 Bing. 238, (25 E. C. L. R. 238,) where land was held to pass to trustees by the words "goods, chattels, estate and effects," there was, in another part of the will, a direction to the same trustees, relative to the lands in question; and, unless those had passed, the purposes of the will could not have been accomplished.

Secondly, supposing, in the present case, that the lands passed to Ann Evans, she took only an estate for her life, the devise containing no words of limitation; and after her death the heir at law of Daniel Evans was entitled as special occupant; *Doe dem. Jeff v. Robinson*, 8 B. & C. 296, (15 E. C. L. R. 222.)

But, thirdly, a devise of this term would have been an alienation, which, if made without consent of the landlord, would have caused a forfeiture; and the Court will not give such a construction to the will as would destroy the estate. In 1 Roll. Abr. 429, tit. *Condition*, (V,) pl. 2, (translated and commented upon, 5 Vin. Abr. 155, tit. *Condition*, (U. a,) pl. (2),) it is said that, "if lessee for years, upon condition not to alien without the assent of the lessor, makes his executor, and devises it to him, and the executor enters generally, the testator not being indebted to any body, this is a forfeiture of the condition." The meaning of the words "not being indebted," there, is, that if there were debts it would be taken that the party entered as executor, and not as specific legatee. If he entered in the latter character a forfeiture would be incurred. *Knight v. Mory*, Cro. Eliz. 60; *Barry v. Stanton*, Cro. Eliz. 330, and *Berry v. Taunton*, Cro. Eliz. 331, also show that a condition not to alien, or not to demise, is broken by devising. It was, indeed, said, in *Fox v. Swann*, Style, 482, (a) that if lessee covenant not to assign without leave, and afterwards devise the term without leave, this is not a breach, "for a devise is not a lease." But the report is loose, and it does not appear that the dictum related to the main question in the case. In *Doe dem. Coore v. Clare*, 2 T. R. 793, the Court, in considering whether an instrument was a lease or only an agreement, noticed the circumstance that, if it had been a lease, a forfeiture would have ensued. [Lord DENMAN, C. J. I think we cannot enter into such a consideration here. The parties may not have adverted to the consequences.] (u)

Clarke, Wilson and *W. M. Jumes*, contra, proposed to begin with the point as to forfeiture; but were desired by the Court to address themselves to the other parts of the case first: and this point was not afterwards gone into. As to the suggestion that Ann Evans took only a life estate; *Doe dem. Jeff v. Robinson*, 8 B. & C. 296, (15 E. C. L. R. 222,) is distinguishable from this case, because here the testator devises all his *estate*; there the devise was merely of "two closes," without any expression from which more than a grant for life could be inferred. Then as to the first question. The words of devise in this case were large enough to give Ann Evans the freehold property. *Tilley v. Simpson*, 2 T. R. 659, note (b), S. C. 1 Cox, 362, and *Jongsma v. Jongsma*, 1 Cox, 362, decide that, where a testator uses words comprehending all his personal property, and adds to them "estate," that word will carry realty. Here the words are "money, securities for money, goods, chattels, and estate and effects." "The word 'goods' is *nomen generalissimum*, and when construed in the abstract, the term will embrace all the personal estate of a testator:" 1 Roper on Legacies, 222, 3d ed. And in *Campbell v. Prescott*, 15 Ves. 500, (see p. 503,) (cited, 1 Roper on Legacies, 250,) where the testator bequeathed "all" his "sugar-house cupola and merchandize stock with jewels plate household goods furniture and all effects whatsoever," the word "effects" was held to carry the general residue. [COLERIDGE, J. In the present devise, independently of the term "estate," there are more than sufficient words to carry the personalty.] It is not denied that there may, at all events, be unnecessary words; but, if expressions are used by which all the personalty is given, and a word follows which, taken in its ordinary sense, may refer, not to the personalty but to something else, it is pro-

(a) See *Crusoe dem. Blencowe v. Bugby*, 3 Wils. 234; *Doe dem. Goodbehare v. Bevan*, 3 M. & S. 353, judgment of Bayley, J.; 2 Williams on Executors, 876, note (d), 2d ed.

(u) See, as to a similar point, the judgments in *Doe dem. Phillip v. Benjamin*, ante, p. 231.

bable at least that such reference was intended. In *Doe, lessee of Wall, v. Langlands*, 14 East, 370, the word "property," followed by "goods and chattels," was held to pass real estate. And in *Noel v. Hoy*, 5 Madd. 38, where the testator made his wife "the sole executrix of this my will, thereby bequeathing to her all the property of whatever description or sort that I may die possessed of, to be by her appropriated in any manner she may think proper," &c., copyhold was held to pass. It was contended that the words "appropriated" and "possessed" were inconsistent with such a construction, but Sir JOHN LEACH, Vice Chancellor, said the criticism was too nice.

Of the cases cited on the other side, *Doe dem. Bunny v. Rout*, 7 Taunt. 79, S. C. 2 Marsh. 397, (2 E. C. L. R. 32,) is the principal. But there the term "estate" was not used; the residuary words were "every other thing, my property," an expression, in itself, more applicable to chattels than realty; and it was not clear that, without these last words, all the personal property would have passed. In *Timewell v. Perkins*, 2 Atk. 102, "estate" was mentioned, but its operation was confined by the words which followed, "consisting in ready money," &c. Lord Chancellor COWPER's dictum in *Cliffe v. Gibbons*, 2 Ld. Ray. 1324, appears too general when compared with later authorities. Lord ELLENBOROUGH, in *Doe dem. Hick v. Dring*, 2 M. & S. 448, distinguishes between the words "estate" and "effects," saying, "We have a familiar meaning attached to the word effects, in its common use, and as it is used in the statutes relating to bankrupts, where estate and effects, reddendo singula singulis, denote, the one things personal, the other things real." In *Woollam v. Kenworthy*, 9 Ves. 137, Lord ELDON, C., assented to the proposition that, "where there are no special circumstances, real estate will pass" by the words "all my estate and effects," without more; and the same rule of construction applies to the word "property;" *Edwards v. Barnes*, 2 New Ca. 252, (29 E. C. L. R. 324.)

Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the Court. The question was, whether, under the circumstances of this will, it was to be considered that the heir at law was passed over, and the testator's interest in the lands devised to Anne Evans, through whom the defendants claimed. And we think, adverting to the doctrine of Lord HARDWICKE in *Tilley v. Simpson*, 2 T. R. 659, note (b), S. C. 1 Cox, 362, that of Lord KENYON in *Jongsma v. Jongsma*, 1 Cox, 362, and the later cases in which the same principle has been acted upon as in those decisions, that the realty does pass by the word "estate" in this will, the term used being capable of passing it, and the accompanying words being satisfied by reference to the personal property. The rule will therefore be absolute.

Rule absolute.

In the Matter of The Examiners of Attorneys.—p. 728.

A candidate for admission to practise as an attorney having failed, on examination, to satisfy the Examiners, the Court, under particular circumstances, made an order that if, on re-examination in the next term, he should obtain his certificate, he might be admitted without having given a fresh term's notice under Reg. Gen. Hil. 6 W. 4, s. 4.

SIR *W. W. Follett* moved that a party might, in the next term, on obtaining his certificate from the Examiners, be admitted an attorney of this Court without giving a term's notice. The party applying deposed that, expecting to pass his examination and be admitted this term, he had made arrangements to join A. and B., practising attorneys in one of the colonies, (which he named.) That it was of considerable importance to his interests in the profession that he should do so as early as possible after March next, the month in which he had arranged to join the above-named attorneys. That, not being sufficiently prepared, he had failed, on his examination under Reg. Gen. Hil. 6 W. 4, 4 A. & E. 745, 746, to satisfy the examiners; and their secretary had informed him that they could not then give him a certificate to enable him to be admitted and practise, but that they would take his examination next term, if this Court would authorise them to do so without a fresh term's notice. (a)

Per Curiam, (b)

Ordered, that the examiners appointed, &c. be at liberty to examine the said C. D., next Easter term, and, in the event of the said C. D. obtaining the usual certificate on such examination, that he be sworn, enrolled, and admitted an attorney of this Court without giving a term's notice.

- (a) See *In the Matter of The Examiners of Attorneys*, 8 A. & E. 745, (35 E. C. L. R. 514)
 (b) Lord Denman, C. J., Littledale, Williams, and Coleridge, Js.

The QUEEN against The Trustees and Managers of the NORTH-WICH Savings' Bank.—p. 729.

The Court will not grant a mandamus requiring trustees of a Savings' Bank to refer a dispute to arbitration under stat. 9 G. 4, c. 92, s. 45, where it is clear that the enquiry could have no result.

As where, by a rule of the bank, no deposit can be claimed after the expiration of seven years from the death of the depositor, and a claim, which it is proposed to refer, was confessedly not made within that time.

A RULE nisi was obtained in the last term for a mandamus, calling on the above trustees and managers to refer to arbitration, according to stat. 9 G. 4, c. 92, s. 45, a dispute between the bank and Thomas Lyon, touching a deposit of 163*l.* which Lyon alleged to have been placed in the bank by his late wife. She died in 1826; and Lyon stated that he had since made several applications to the trustees for her deposit, but without success; and that his circumstances and situation in life had prevented his taking any other step.

The trustees put in affidavits giving an answer to the application on the merits; and they also relied upon a rule of the bank, in force when the 163*l.* was deposited, by which any claim for the funds of a deceased depositor was barred, if not made within seven years from his death. The present demand had not been so made.

Evans now showed cause, and stated the above-mentioned rule. The Court then called upon

Wightman, contra. It is clear that the wife's deposit was in the

hands of the trustees; they deny that it is now due. That raises one of the disputes which, by the express provision of the statute, are to be referred to arbitration. The objection, that the claim is barred by lapse of time, may be fit for discussion before the arbitrator; but *Rex v. The Mildenhall Savings' Bank*, 6 A. & E. 952, shows that such a suggestion ought not to prevent the reference. There may have been some waiver of the objection by the trustees. It is sufficient for the purpose of this application that a dispute exists. Enactments framed for the purpose of saving expense in cases of this kind should be liberally construed.

Lord DENMAN, C. J. The preliminary objection is properly taken. The depositor has been dead twelve years; and a rule of the bank, which was part of the constitution of the society, barred any claim after seven. We cannot help seeing that the inquiry would be one which could have no result.

LITLEDALE, WILLIAMS, and COLERIDGE, Js., concurred.

Rule discharged.

Case of LEONARD WATSON and Others.—p. 731.

At common law, a Judge of the Court of King's Bench may grant in vacation a writ of *habeas corpus ad subjiciendum*, returnable *immediatè* at chambers, to bring up the body of a party in custody in execution of a criminal sentence.

After the return to the *habeas corpus* has been put in and read, it is considered as filed; but the Court has nevertheless power to amend it.

The return to a *habeas corpus*, directed to the gaoler of Liverpool, set out a statute of Upper Canada, (passed after stat. 5 G. 4, c. 84,) to enable the government thereof to extend a conditional pardon to persons concerned in the late insurrection, whereby it was enacted that, on the petition of any person charged with high treason there committed, preferred, before arraignment, to the Lieutenant Governor, confessing such person's guilt, and praying for pardon, the Lieutenant Governor might grant a pardon on such conditions as might appear proper, which pardon was to have the effect of an attainder for high treason, so far as regarded reality and personalty; and that, where a person, pardoned on condition of transportation or banishment from the province, should return, contrary to the condition, this should be a capital felony; the return also set out other statutes, (passed after stat. 5 G. 4, c. 84,) whereby it appeared that both transportation and banishment were inflicted in certain cases by the criminal law of Upper Canada, and that they were also imposed as commutations for the punishment of death in cases of capital conviction; the place of transportation, in either case, to be declared under the sign manual of the Lieutenant Governor. The return then stated that the prisoner, having been indicted for high treason, had, before arraignment, petitioned, confessed, and prayed for pardon, and had been pardoned on condition of being transported for his life to Van Diemen's Land, to which he had assented; that, there being no means of transporting him thither directly from Upper Canada, it was necessary to take him to Quebec, in Lower Canada, being the most convenient place for the purpose; and that he was conveyed, by warrant of the Lieutenant Governor of Upper Canada, to Lower Canada; and, on his arrival there, was by warrant of the Governor of Lower Canada, delivered into the custody of the sheriff of Quebec, for safe keeping till he could be transported; that, there being no means of conveying the prisoner directly from Lower Canada to Van Diemen's Land, it was necessary to convey him to England, to be taken thence to Van Diemen's Land; and that, by letters patent of the Queen under the Great Seal of Lower Canada, the master of the bark C. was commanded to receive the prisoner from the sheriff of Quebec, and carry him to such part of Great Britain as should seem fit to the Queen, that he might be thence transported to Van Diemen's Land, and to deliver him, in England, to the custody of such person as should be authorized to receive him; that the master received him from the sheriff, and carried him to Liverpool, which place seemed fit to the Queen, and was the most convenient in that behalf; and there not being means ready to convey him to Van Diemen's Land, it was necessary to place him in safe custody till means could be provided; and that the gaol of Liverpool being the most fit custody the master delivered him to the gaoler, who kept him in custody, while such means were preparing: Held, a good return. For

- (1) The provincial legislature, under stat. 31 G. 3, c. 31, had the power to pass laws for transportation *extra fines*, which power is recognised in stat. 5 G. 4, c. 84, s. 17; and they might empower the governor to pardon on such conditions "as might appear proper." Therefore
 - (2) The condition of transportation might here be legally annexed to the pardon, with the prisoner's assent.
 - (3) The crown had a right to enforce the condition; and the Queen's subjects, without the province of Upper Canada, were justified in assisting, the province not being a foreign country.
 - (4) It was not necessary that the return should specially set out the documents referred to.
 - (5) The Crown might appoint Van Diemen's Land as a place of transportation, and the Court would presume that proper steps had been taken for the prisoner's reception there.
- A similar return held good where the condition was transportation for fourteen years from the prisoner's arrival in Van Diemen's Land.

The like, where the returns stated capital convictions for high treason and felony, and commutations of the sentences, not specifying the treason or felony.

Held, also, that the return must be taken to be true on the motion to discharge out of custody; and need not be verified by affidavit. *Quære*, whether there be any and what mode (other than by action) of impeaching the truth of such a return, or of introducing new matter?

It appeared, on affidavit, that in the mandatory part of the letters patent addressed to the master of the bark, the prisoner's name was omitted, though it stood in the recital; and that the return, as originally drawn, had set out the letters patent, which were also incorrect in other particulars; but that the present return, stating the substance as above, had been drawn by counsel, and filed instead of the original return.

Held, that the gaoler might substitute a return drawn by counsel for that originally prepared.

It appearing by affidavit that the omission of the name was unknown to the gaoler, an attachment against him was refused, though the Court considered him blameable for negligence.

Held, that the letters patent were immaterial; but that, had the return been intentionally false, the gaoler would not have been protected by the immateriality, nor by the circumstance that the prisoner had not been injured by the falsehood.

In the last vacation twelve writs of habeas corpus were obtained, on application to LITTLEDALE, J., at chambers, severally directed to the person or persons having the custody of Leonard Watson, John Goldsbury Parker, Randall Wixon, James Brown, Finlay Malcolm, Robert Walker, Ira Anderson, John Grant, William Alves, Paul Bedford, Lynus Wilson Miller, and William Reynolds, and commanding such person or persons to bring the body of the party before the Lord Chief Justice, or such other Judges as should be at chambers, immediately after the receipt of the writ, together with the day and cause of his being taken and detained, to undergo, &c. The writs were dated 26th November, 2 Victoria, (the last day of Michaelmas term, 1838,) and were obtained on the affidavits of Joseph Hume and John Arthur Roebuck, Esquires, stating that the prisoners (some of whom were referred to in one affidavit, and some in the other) were, as the deponents believed, illegally detained in the borough gaol of Liverpool, having been brought to Liverpool from Upper Canada contrary to their wishes, some not having been tried or sentenced, and some not having been legally accused or called on to plead.

On Saturday, 12th January, in this term, Sir J. Campbell, Attorney-General, having mentioned the case in Court, it was agreed by the counsel on both sides that the prisoners should be brought up, and the validity of the returns discussed, in full Court; Lord DENMAN, C. J., saying that, had the case been argued at chambers, it would have been thought right that other Judges, besides the one sitting at chambers, should attend the hearing; and that it was unnecessary to go through the form of bringing the prisoners up at chambers and adjourning to the full Court.

In the same term, Monday, 14th January, the prisoners were brought
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up in full Court. (a) The returns were then put in. The return in the case of Leonard Watson was read, which was as follows.

"I, William Batchelder, keeper of her Majesty's gaol of and for the borough of Liverpool, in the writ to this schedule annexed named, do certify and return, in obedience to the said writ, that by a certain statute of her Majesty's province of Upper Canada in North America, (b) intitled 'An act to enable the government' of this province to extend a conditional pardon in certain cases to persons who have been concerned in the late insurrection,' made and passed in the first year of the reign of her present Majesty, by the Queen's most excellent Majesty, by and with the advice and consent of the legislative council and assembly of the said province, under and by virtue of a certain act of parliament, made and passed in the thirty-first year of the reign of his late Majesty King George the Third, intitled 'An act to repeal certain parts of an act passed in the fourteenth year of his Majesty's reign, intitled "An act for making more effectual provision for the government of the province of Quebec in North America," and to make further provision for the government of the said province,' and which first-mentioned statute was duly passed by the legislative council and assembly of the said province of Upper Canada, and assented to in her Majesty's name by the person who had been appointed, and was, at the time of passing the said first-mentioned statute as aforesaid, by her Majesty, (c) to be the Governor of the said province of Upper Canada, it was, among other things, enacted (d) that upon the petition of any person charged with high treason committed in the said province, preferred to the Lieutenant Governor before the arraignment of such prisoner, (e) and praying to be pardoned for his offence, it should and might be lawful for the Lieutenant Governor of the said province, by and with the advice and consent of the executive council thereof, to grant, if it should seem fit, a pardon to such person, in her Majesty's name, upon such terms and conditions as might appear proper; which pardon, being granted under the Great Seal of her Majesty's said province, and reciting in substance the prayer of such petition, should, have the same effect as an attainder of the person therein named for the crime of high treason, as far as regarded the forfeiture of his estate and property, real and personal. And I do further certify that, after passing the said first-mentioned statute, to wit, at a special session of oyer and terminer and gaol delivery, begun and holden at Toronto, in the home district of the said province, on Thursday, the 8th day of March, in the first year of the reign of her said Majesty, before the Honourable JOHN BEVERLY ROBINSON, Chief Justice of the said province, and others, his fellows, justices and commissioners of our said Lady the Queen, under and by virtue of her said Majesty's commission under the Great Seal of the said province, issued in pursuance of another statute (f) of her Majesty's said province duly passed in the same manner and by the same authority as the said first-mentioned statute, on the 12th day of January in the first year of her Majesty's reign, and intitled 'An act to provide for the more effectual and impartial trial of persons charged with treason and treasonable practices committed in this province,' the said Leonard Watson was indicted for the crime of high treason; and, before the arraignment of the said Leonard Watson, he, the said Leonard Watson, humbly petitioned the Lieutenant Governor of the said province, in accordance with the said statute first herein mentioned, confessing his guilt of the treason charged against him as aforesaid, and professing his penitence, and praying for the merciful consideration of his case, and that her Majesty's gracious pardon might be extended to him upon such conditions as the said Lieutenant Governor of the said province, by and with the advice of the said executive council, should see fit: and the said Lieutenant Governor, by and with the advice of the said executive council, did, in her said Majesty's behalf, consent that mercy should be extended to him, the said Leonard Watson, upon the conditions following: (that is to say) that the said Leonard Watson be transported, and remain transported, to her Majesty's penal colony of Van Diemen's Land, for and during the term of his natural life; to which terms and condition the said Leonard Watson did assent; and the said Lieutenant Governor did thereupon, in her Majesty's name, on the 22d of October in the year of our Lord, 1838, aforesaid, by letters patent under the Great Seal of the said province of Upper Canada, dated the day and year last aforesaid, pardon, remit, and release the said Leonard Watson of and from all and every punishment whatsoever which might be inflicted upon him, the said Leonard Watson, by reason of the treason so as aforesaid confessed by him, upon condition, nevertheless, that he, the said Leonard Watson, should be transported, and remain transported, to the said penal colony of Van Diemen's Land, for and during the term of his natural life. And I do further certify and return that, there being no means of transporting the said Leonard Watson directly from Upper Canada aforesaid to Van Diemen's Land aforesaid, it became and was necessary to take him to Quebec in her Majesty's province of Lower Canada in North America, for the purpose of carrying the

(a) Before Lord Denman, C. J., Littledale, Williams, and Coleridge, Ja.

(b) 1 Vict. c. 10. (Passed 6th March, 1838.)

(c) Sic.

(d) Sect. 1.

(e) Sic in return; "person" in the statute.

(f) Stat., Upper Canada, 1 Vict. c. 2.

said condition in the said pardon into effect, the said place called Quebec being the readiest and most convenient place for that purpose: whereupon, and in order to carry the said condition into effect, the said Leonard Watson was, after the said pardon, conveyed, by the authority and warrant of the said Lieutenant Governor of Upper Canada, from the said province of Upper Canada unto (a) the said province of Lower Canada, and was there, upon his arrival in Lower Canada aforesaid, by virtue of a warrant, in that behalf, of Sir John Colborne, Governor of the said province of Lower Canada, delivered into the custody of the sheriff of the district of Quebec in Lower Canada aforesaid, for safe keeping, until he could be transported according to the said condition, the same being the proper and most convenient custody in that behalf. And I do further certify and return that, there not being any means of conveying the said Leonard Watson directly from Lower Canada aforesaid to Van Diemen's Land aforesaid, according to the said condition, it became and was necessary, in order to carry the said condition into effect, to convey the said Leonard Watson to England, to be taken from thence to Van Diemen's Land, in fulfilment of the said condition: and thereupon afterwards, to wit, on the 17th day of November, 1838, by certain letters patent of our said Lady the Queen, bearing date the day and year last aforesaid, and sealed with the Great Seal of the province of Lower Canada, and directed to one Digby B. Morton, master of the bark Captain Ross, our said Lady the Queen commanded the said Master to receive the said Leonard Watson from the said sheriff of the district of Quebec, in the said province of Lower Canada, in whose custody the said Leonard Watson then was as aforesaid; and that the said master should forthwith transport and convey, or cause to be transported and conveyed, the said Leonard Watson to such part of the United Kingdom of Great Britain and Ireland called England as to our said Lady the Queen might seem fit, to the end that the said Leonard Watson might be thence again transported to her Majesty's said penal colony of Van Diemen's Land, according to the said condition in the said pardon; and that the said master should there, to wit, in England aforesaid, deliver the body of the said Leonard Watson into the custody of such person or persons as might be lawfully authorized to receive the same. And I do further certify and return, in obedience to the said writ, that the said Digby B. Morton, so being master of the said bark, did, in obedience to the said last-mentioned letters patent, receive the body of the said Leonard Watson from the said sheriff of the said district of Quebec, and take him on board the said bark, and bring him to Liverpool in England aforesaid, the same being a place which seemed fit to her said Majesty, and which was the most proper and convenient in that behalf, to the end that the said Leonard Watson might be thence again transported to Van Diemen's Land, as aforesaid: And, the said Digby B. Morton having arrived with the said ship at Liverpool as aforesaid, to wit, on the 17th day of December last, with the said Leonard Watson on board thereof, and there not being the means immediately ready for conveying him from Liverpool aforesaid to Van Diemen's Land as aforesaid, it became and was necessary that the said Leonard Watson should be placed in some safe custody until the means could be provided for conveying him to Van Diemen's Land as aforesaid: And, the said gaol of and for the said borough of Liverpool being the fittest and most convenient place for that purpose, he, the said Digby B. Morton, did, on the day and year last aforesaid, deliver the said Leonard Watson into my custody at Liverpool aforesaid; and I have kept him in my custody whilst means have been and are preparing with all possible dispatch for the causing the said Leonard Watson to be transported to Van Diemen's Land as aforesaid. And these are the causes of my detaining the said Leonard Watson in my custody, and whose body I have ready, as by the said writ I am commanded."

Sir John Campbell, Attorney-General, Sir W. M. Rolfe, Solicitor-General, Sir F. Pollock and Wightman appeared for the Crown, and Hill, Falconer, Roebuck and Fry for the prisoner.

The Counsel for the Crown. The prisoners must be remanded upon a preliminary objection. This is not a case in which a judge in vacation can issue a writ of habeas corpus returnable before himself at chambers. The question is important, with a view to the general law on the subject; but the prisoners, if the objection prevail, will not suffer by it; as the objections to the returns may be discussed on a different course of proceeding. A motion for a habeas corpus at common law must be made in term time, and reasons stated for the motion. This appears from *Hobhouse's Case*, 3 B. & Ald. 420; S. C. 2 Chitt. Rep. 207, (5 E. C. L. R. 330,) and the authorities there cited. Now the writ in the present instance must be considered as one at common law; for it is not authorized by any statute. The Habeas Corpus Act,

(a) See post, p. 274. note (b).

stat. 31 C. 2, c. 2, does not apply to such a case. The prisoners are here committed in execution. Sect. 1 of stat. 31 C. 2, c. 2, shows that the grievance which that statute was intended to redress was the delay of the trial of prisoners committed on criminal charges. Sect. 2 directs that, where the commitment is not for treason or felony, plainly and specially expressed in the warrant of commitment, the prisoner shall be brought before the Lord Chancellor, the Lord Keeper of the great seal, or the judges or barons of the Court from whence the writ shall issue, or such other person or persons before whom the writ shall be made returnable: and, by sect. 3, if any person be committed or detained for any crime, unless for felony or treason plainly expressed in the warrant, in the vacation time, and out of term, it shall be lawful for the person or persons so committed or detained ("other than persons convict or in execution by legal process") to complain to the Lord Chancellor or Lord Keeper, or any justice, either of the one bench or of the other, or the barons of the exchequer of the degree of the coif, who, on request, and view of the copy of the warrant, or oath made that a copy is denied, are to award the habeas corpus under the seal of the Court to which the judge, &c., belongs, returnable *immediatè* before the said Lord Chancellor, or Lord Keeper, or such justice, &c., who shall, within two days after the party is brought before them, discharge him on his recognizance to appear in the proper Court; unless it appear that the party is detained on legal process for matters in law for which he is not bailable. Sect. 7 provides for bringing speedily to trial parties committed for treason or felony plainly or specially expressed in the warrant. From the nature of these provisions it is clear that this statute relates only to parties committed on a criminal charge previously to trial. Then stat. 56 G. 3, c. 100, (commonly called Onslow's Act,) recites (sect. 1) that stat. 31 C. 2, c. 2, and the Irish "Act for better securing the liberty of the subject," Irish stat. 21 & 22 G. 3, c. 11, "only extend to cases of commitment or detainer for criminal or supposed criminal matter;" and enacts, "That where any person shall be confined or restrained of his or her liberty, (otherwise than for some criminal or supposed criminal matter, and except persons imprisoned for debt or by process in any civil suit,)" "it shall and may be lawful for any one of the Barons of the Exchequer, of the degree of the coif, as well as for any of the justices of one Bench or the other," "and they are hereby required, upon complaint made to them by or on the behalf of the person so confined or restrained, if it shall appear by affidavit or affirmation (in cases where by law an affirmation is allowed) that there is a probable and reasonable ground for such complaint, to award in vacation time, a writ of *habeas corpus ad subjiciendum*, under the seal of such court, whereof he or they shall then be judges or one of the judges, to be directed to the person or persons in whose custody or power the party so confined or restrained shall be, returnable immediately before the person so awarding the same, or before any other judge of the Court under the seal of which the said writ issued." This statute, therefore, does not apply to detainers under execution upon criminal process, but to such cases as the confinement of a wife by her husband, or the improper carrying away of a child by its mother. [COLERIDGE, J. In *Ex parte Beeching*, 4 B. & C. 136, (10 E. C. L. R. 293,) the statute was applied to the case of a party detained upon a charge of smuggling.] That was a commitment merely to enforce a

penalty, which was considered as a civil matter. This appears by the authority on which *Ex parte Beeching* was decided, *The Attorney-General v. Bowman*. (a) [COLERIDGE, J. Are you justified in assuming that a common law *habeas corpus ad subjiciendum* cannot issue in vacation returnable in vacation? In 3 Blackst. Com. 131, it is said, "This is a high prerogative writ, and therefore by the common law issuing out of the Court of King's Bench not only in term time, but also during the vacation, by a fiat from the chief justice or any other of the judges, and running into all parts of the king's dominions: for the king is at all times entitled to have an account, why the liberty of any of his subjects is restrained, wherever that restraint may be inflicted. If it issues in vacation, it is usually returnable before the judge himself who awarded it, and he proceeds by himself thereon; unless the term should intervene, and then it may be returned in Court."'] The last sentence must be considered as applicable only to writs under stat. 31 C. 2, c. 2; otherwise the doctrine seems unfounded. [The *Counsel for the prisoners* stated that they supported the proceeding as one at common law.] In *Brass Crosby's Case*, 2 W. Bl. 754, S. C. 3 Wils. 188, the party was committed by a warrant of the Speaker of the House of Commons, and brought before the Court of Common Pleas by *habeas corpus* moved for and returnable in term time: and it seems to have been understood that the writ at common law could not be taken out and made returnable before a judge in vacation. For the reporter, Sir W. Blackstone, says, at the end of the report, "This was an *habeas corpus* at common law. An application had been made, in the preceding vacation, to Lord MANSFIELD, Chief Justice of the King's Bench, and Lord Chief Justice DE GREY, separately, to discharge the Lord Mayor, and Mr. Alderman Oliver, who was in the same situation, by a *habeas corpus*, under the statute 31 Car. 2. But they were then remanded." Thus, the case not being considered within stat. 31 Car. 2, c. 2, and the common law remedy being therefore resorted to, that was attempted by an application in term time. [COLERIDGE, J., referred to *Crowley's Case*, 2 Swanst. 1.] There Lord ELDON decided, upon a review of all the authorities, that the Court of Chancery had the power in vacation, over-ruling Lord NOTTINGHAM's decision in *Jenkes's Case*, 6 How. St. Tr. 1189; and in *Crowley's Case*, 2 Swanst. 12, 83, which is supposed to have been the cause of the passing of stat. 31 C. 2, c. 2. Lord ELDON's decision is perfectly consistent with the doctrine now contended for on the part of the Crown. Properly speaking, the three common law courts act only in term time, except under particular statutes: but the Court of Chancery, being the *officina justitiæ*, is always open. Here the writ, though tested (by fiction) in term time, is returnable before a Judge at chambers; (b) and, indeed, it is doubtful whether even the teste ought to have been dated in term time; for although ordinary writs, of many kinds, may be so tested, yet, where, by express statute or defined practice, a writ ought to issue in a particular term, such fiction is inadmissible; *Regina v. Ricketts*, 8 A. & E. 951, (35 E. C. L. R. 572.) (c) Lord ELDON, in *Crowley's Case*, 2 Swanst. 48, &c., cites Lord COKE's reading on Magna Charta, 2 Inst. 53, 55, on stat. 9 Hen. 3, c. 29, and 2 Inst. 552, on the Articuli super Chartas, 28 Edw. 1, stat.

(a) Note (a) to *Huntley v. Luscombe*, 2 B. & P. 532.

(b) The writs were not marked "per statutum," &c., under stat. 31 Car. 2, c. 2, s. 3

(c) See p. 338.

3, c. 5, and 4 Inst. 81, 182; in which passages the same distinction between the Court of Chancery and the Courts of law is clearly pointed to. (a) If the power contended for existed at common law, much of the provisions of stat. 31 C. 2, c. 2, and stat. 56 G. 3, c. 100, would have been superfluous. And there is good reason for not extending the remedy by writ returnable before a single Judge to cases of commitment in execution: for it would be inexpedient that a single Judge at chambers should revise the judgment of a criminal court. In 4 Bac. Abr. 117, 7th ed., (and see 15 Parl. Hist. 898, &c.) *Habeas Corpus*, (B) 1, it is said, "It is clear, that both by the common law, as also by the statute, the Courts of Chancery and King's Bench have jurisdiction of awarding this writ of *habeas corpus*, and that without any privilege in the person for whom it is awarded. But it seems that, by the common law, the Court of King's Bench could have awarded it only in term time, but that the Chancery might have done it as well out of as in term, because that Court is always open." In the same volume, p. 140, is a note giving an account of the opinions of the Judges upon questions put to them, in 1758, when it was proposed to introduce a bill which should contain provisions mainly corresponding with those in the statute afterwards passed, 56 G. 3, c. 100: and it appears that there was great difference of opinion among them as to the power of the Judges in vacation, before, or independently of, stat. 31 C. 2, c. 2. The opinion of WILMOT, J., afterwards C. J. of C. P., is published at length in Notes of Opinions and Judgments delivered by Sir John Eardley Wilmot, p. 77. [Lord DENMAN, C. J., referred to *Rex v. Shebbeare*, 1 Bur. 460; *Rex v. Mead*, 1 Bur. 542; *Rex v. Clarke*, 1 Bur. 606. COLERIDGE, J. Blackstone, 3 Com. 131, has this note. "The *pluries habeas corpus* directed to Berwick in 43 Eliz., (cited 4 Burr. 856,) (b) was *teste' d die Jovis prox' post quinden' Sancti Martini*. It appears, by referring to the dominical letter of that year, that this *quindena* (Nov. 25) happened that year on a Saturday. The Thursday after was therefore the 30th of November, two days after the expiration of the term." This appears to confirm his view in the text, (c) that at common law the writ might be returnable in vacation.] Lord ELDON, in *Crowley's Case*, 2 Swanst. 39, remarks that Blackstone has given the history of the writ, "perhaps not altogether with his usual accuracy;" and he comments upon Blackstone's account at some length. In *Rex v. Shebbeare* it was held that a *habeas corpus*, issued by the Chief Justice of the King's Bench in vacation and returnable *immédiatè*, ran on through the ensuing term, and did not require renewal. It does not, however, appear that this was not a case under stat. 31 C. 2, c. 2: (d) it took place after the passing of the act, and so did *Rex v. Mead*, 1 Bur. 542, and *Rex v. Clarke*, 1 Bur. 606. Sect. 8 of stat. 16 C. 1, c. 10, which was the statute that abolished the Star-Chamber, enacts,

(a) Lord Eldon adds, "It is quite clear here, that Lord Coke, when he wrote the fourth volume of his Institutes, still continued of opinion that the Court of King's Bench could grant the writ only in term time; an opinion which I think is not well founded, but which it is extremely difficult to deny would have been thought well founded, at the time when Lord Coke wrote." 2 Swanst. 50.

(b) The precedent is *Crowley's Case*, cited in *Rex v. Cowle*, 2 Bur. 856, from *Richard Bourn's Case*, Cro. Jac. 543.

(c) Cited, *antè*, p. 259.

(d) See Smollett's Hist. of England, Reign of George the Second, vol. iv p. 409, book iii. c. 30, ed. 1791. 2 Starkie on Libel, 164, note (i).

"That if any person shall hereafter be committed, restrained of his liberty, or suffer imprisonment, by the order or decree of any such Court of Star-Chamber, or other Court aforesaid, now or at any time hereafter, having or pretending to have the same or like jurisdiction, power or authority to commit or imprison as aforesaid, or by the command or warrant of the King's Majesty, his heirs or successors, in their own person, or by the command or warrant of the council-board, or of any of the lords or others of his Majesty's privy council; that in every such case every person so committed, restrained of his liberty, or suffering imprisonment, upon demand or motion made by his counsel, or other employed by him for that purpose, unto the Judges of the Court of King's Bench or Common Pleas, in open court, shall without delay, upon any pretence whatsoever, for the ordinary fees usually paid for the same, have forthwith granted to him a writ of *habeas corpus*, to be directed generally unto all and every sheriffs, gaoler, minister, officer, or other persons in whose custody the party committed or restrained shall be, and the sheriffs, gaoler, minister, officer or other person in whose custody the party so committed or restrained shall be, shall at the return of the said writ, and according to the command thereof, upon due and convenient notice thereof given unto him," &c., "bring or cause to be brought the body of the said party so committed or restrained unto and before the Judges or justices of the said Court from whence the said writ shall issue, in open court, and shall then likewise certify the true cause of such his detainer or imprisonment, and thereupon the Court, within three court-days after such return made and delivered in open court, shall proceed to examine and determine whether the cause of such commitment appearing upon the said return be just and legal, or not, and shall thereupon do what to justice shall appertain, either by delivering, bailing, or remanding the prisoner." These provisions clearly are applicable only to proceedings in full court, and in term, and it is difficult to believe that the legislature, when this statute passed, considered that the Judges had individually a power to issue the writ in vacation, returnable immediately. In *Crowley's Case*, 2 Swanst. 44, Lord ELDON treats it as "clear that under that act of Car. 1, the Courts of King's Bench and Common Pleas could not issue the writ in vacation." In 4 Bac. Abr. 123, 7th ed., *Habeas Corpus*, (B) 4, it is said, with reference to the law antecedent to stat. 31 C. 2, c. 2, "Notwithstanding the writ of *habeas corpus* be a writ of right, and what the subject is entitled to, yet the provision of the law herein was in a great measure eluded by the Judges being only enabled to award it in term time." Therefore, although the learned Judge here did rightly in issuing the writ, the return shows want of jurisdiction in this particular course, and the prisoners should be remanded.

LORD DENMAN, C. J., on the next day, January 15th, said:—The Court have considered the objection which was taken yesterday, and are of opinion that it is not necessary to hear the counsel for the prisoners against that objection. We have no doubt that we are bound by the practice which has now prevailed, for eighty years since the year 1758, of issuing writs of *habeas corpus* before Judges returnable *immediate*, and before themselves, in time of vacation. In 1758, a bill was introduced into the House of Lords for the purpose of remedying some of the defects in the law of *habeas corpus*, as it then stood: and, upon that occasion, a majority of the Judges consulted gave their

opinion in the way I have now stated. Mr. Justice WILMOT, afterwards Lord Chief Justice, stated, as his ground, that, for at least eighty years, and probably before that time, the same practice had prevailed; so that we have at least twice that period. They also refer to some cases of an earlier date. I am aware that we might have been extremely well entertained for several days in entering into an antiquarian discussion as to what quantity of writs might be found to have been issued, and what returns were extant, and how the records were kept: but it seems to me that we should be tampering with this great remedy of the subject, the writ of habeas corpus, if we did not say that we would abide by the practice we find, and deal with this as it has been formerly dealt with. Therefore, we will now proceed to enquire whether the return is sufficient. On the discussion in 1758, according to Mr. Dodd's very interesting account in his edition of Bacon's Abridgment, 7th ed. vol. iv. p. 140, *Habeas Corpus*, (B,) 13, note, (and see 15 Parl. Hist. 903,) seven of the Judges, including the Chief Baron, Lord Chief Justice WILLES, and Mr. Justice WILMOT, afterwards Chief Justice, were of the opinion I have stated. Mr. Justice FOSTER was not able to attend by reason of the death of his wife. He is well known to have been of the same opinion, and to have wished even to extend the remedy of the habeas corpus still further. Lord MANSFIELD was a member of the House of Lords at the time: and his opinion is well ascertained by his practice since that time: (a) and the very fact of the bill, which had been introduced, being dropped is a pretty good proof of the opinion of Judges being consistent with the law as it then stood. (b)

A question then arose, whether the return which had been read could be considered as filed, and whether, if filed, it could be amended: as to which *The Counsel for the Crown* cited an *Anonymous case*, 1 Mod. 102, in 1 Mod. The Court, after consulting Mr. *Dealtry*, said that the return was filed, but that they had the power to amend it.

The Counsel for the prisoners then moved that Watson should be discharged. First, there is no conviction. The provincial act, 1 Vict. c. 10, set out in the return, authorizes the Lieutenant-Governor, on petition by a person charged with high treason, preferred before arraignment, to pardon him, on such terms and conditions as may appear proper; which pardon is to have the effect of an attainder for high treason, so far as regards forfeiture of real and personal property. And the return recites the indictment of Watson for high treason, his petition before arraignment, his prayer for pardon, and a pardon on condition of transportation for life. Here is no conviction. There is, therefore, no authority by the English law for detaining the prisoner in England. Stat. 5 G. 4, c. 84, s. 17, (c) applies only to convicts who have been convicted "by any Court or Judge." Here no judicial

(a) Hill said, that this was also the view taken by Lord Chancellor Hardwicke. See 15 Parl. Hist. p. 898, (note.) and p. 924. (note.)

(b) See further, on this point, p. 278, post.

(c) Stat. 5 G. 4, c. 84, s. 17. "And whereas by the laws in force in some parts of his Majesty's dominions not within the United Kingdoms, offenders convicted of certain offences are liable to be punished by transportation beyond the seas, and other convicts adjudged to suffer death in such parts of his Majesty's dominions have received or may receive his Majesty's most gracious pardon upon condition of transportation beyond the seas, and there may be no means of transporting such convicts to any of the places appointed by his Majesty in council of that behalf, without first bringing them to England; Be it therefore further enacted, that whenever

authority has acted, but only an executive one. It will probably be contended, on the other side, that what has here taken place is tantamount to a conviction; but such a construction of the terms of a penal statute is inadmissible. If the prisoner here has been convicted, how is error to be assigned on the conviction? How could he plead autrefois convict to a fresh indictment? This proceeding will be scrupulously watched by the Court, because the general principle of the law is to protect parties, who are subject to legal process, from acts done by themselves in ignorance; an instance of which occurs in the Rule, Hil. 2, W. 4, I 72, 3 B. & Ad. 384, and the older rules in pari materiâ, 2 Stra. 902, and note (1) *ibid.* In fact, however, the provincial statute referred to, 1 Vict. c. 10, confines, by implication, the consequences of the pardon; for it enacts that the pardon "shall have the same effect as an attainder of the person therein named for the crime of high treason, *as far as regards the forfeiture of his estate and property, real and personal.*" It cannot be supposed that the provincial legislature, which found it necessary to insert these words, considered that the pardon was of itself tantamount to a conviction. But, further, stat. 14 G. 3, c. 83, s. 11, after reciting that "the certainty and lenity of the criminal law of England, and the benefits and advantages resulting from the use of it, have been sensibly felt by the inhabitants" of the province of Quebec, then comprehending both Upper and Lower Canada, enacts "that the same shall continue to be administered, and shall be observed as law in the province of Quebec, as well in the description and quality of the offence as in the method of prosecution and trial, and the punishments and forfeitures thereby inflicted to the exclusion of every other rule of criminal law, or mode of proceeding thereon, which did or might prevail in the said province before the year of our Lord, 1764; any thing in this act to the contrary thereof in any respect notwithstanding; subject nevertheless to such alterations and amendments as the governor, lieutenant-governor, or commander in chief for the time being, by and with the advice and consent of the legislative council of the said province, hereafter to be appointed, shall, from time to time, cause to be made therein, in manner hereinafter directed." Then stat. 31 G. 3, c. 31, which divided the province of Quebec into Upper and Lower Canada, enacts, sect. 33, "that all laws, statutes, and ordinances, which shall be in force on the day to be fixed in the manner hereinafter directed for the commencement of this act, within the said provinces, or either of them, or in any part thereof respectively, shall remain and continue to be of the same force, authority, and effect,

any convict adjudged to transportation by any court or judge in any part of his Majesty's dominions not within the United Kingdom, or any convict adjudged to suffer death by any such court or judge, and pardoned on condition of transportation, have been or shall be brought to England in order to be transported, it shall or may be lawful to imprison any such offender in any place of confinement provided under the authority of this act, until such convict shall be transported, or shall become entitled to his liberty; and that so soon as every such convict shall be so imprisoned, all the provisions, rules, regulations, clauses, authorities, powers, penalties, matters and things aforesaid, concerning the safe custody, confinement, treatment and transportation of any offender convicted in Great Britain, shall extend and be construed to extend to every convict who may have been or may be hereafter adjudged to transportation by any court or judge in any part of his Majesty's dominions not within the United Kingdom, and to every convict adjudged by any such court or judge to suffer death, and pardoned on condition of transportation, and brought to England in order to be transported, as fully and effectually to all intents and purposes, as if such convict had been convicted and sentenced at any session of gaol delivery holden in any country within England."

in each of the said provinces respectively, as if this act had not been made, and as if the said province of Quebec had not been divided; except in so far as the same are expressly repealed or varied by this act, or in so far as the same shall or may hereafter, by virtue of and under the authority of this act, be repealed or varied by his Majesty, his heirs or successors, by and with the advice and consent of the legislative councils and assemblies of the said provinces respectively, or in so far as the same may be repealed or varied by such temporary laws or ordinances as may be made in the manner hereinafter specified." That leaves the law of Upper Canada on the footing either of the English law, or of laws passed in the province; as to which latter, the Court can recognise only what appears on the return; and the Court cannot see, on the return, any thing which gives, by the Canadian law, the effect of a conviction to the proceedings stated.

It may be questionable, whether an English Court of law will recognize such a statute as that set out in the return. No limit as to the severity of the conditions is imposed; it does not appear that torture or mutilation might not be inflicted as the condition of pardon. If it be said that the prisoner has, according to the return, consented to the terms, the answer is, that the English law would not recognize the validity of such a contract, if, for instance, it authorized the commission of murder or mayhem.

This points out another objection to the return. No judgment of transportation, or of death commuted for transportation, has been passed. The consent of the party cannot be substituted for such a judgment; and, without the judgment, stat. 5 G. 4, c. 84, s. 17, is inapplicable. The power of the Crown to commute one sentence for another, even the more severe for the less, is, at least in modern times, rested upon statute merely. (a) At all events, it is not communicable in England; stat. 27 H. 8, c. 24, s. 1. It has been said that in the colonies such a power is communicable from the Crown: but, even if that be so, the return sets out no letters patent, or other instrument, by which such a delegation may appear to have taken place in fact: and it is difficult to see how the provincial legislature of a colony can give this power, if not so communicated by the Crown.

But, further, supposing the power of commuting the punishment to exist, the return fails to show any right in the governor of Upper Canada to transport beyond the limits of his own colony. He has no authority in Van Diemen's Land. Stat. 5 G. 4, c. 84, s. 17, applies to cases only where the power to transport beyond seas previously existed: it creates no such power. Even in the case of transportation from Great Britain, where convicts had been adjudged to transportation to one colony, but had from accident or necessity been landed in another, the power to control or detain them in the latter failed; and this defect was remedied only by express statute, 11 G. 4, & 1 W. 4, c. 39, s. 1, &c.

Supposing that the power of transporting to Van Diemen's Land exists, it is not shown to have been legally exercised. The return alleges the necessity of sending the prisoner to Lower Canada, and the warrant issued by the governor of Upper Canada for so sending him. That is all which the governor of Upper Canada appears by the return to have done. It is not shown that he ordered any further step to be taken. Then the governor of Lower Canada commits the prisoner to the cus-

(a) See the statutes cited in *Regina v. Baker*, 7 A. & E. 502, (34 E. C. L. R. 147.)

tody of the sheriff of Quebec; and it is said that, in order to convey the prisoner to Van Diemen's Land, it became necessary to send him from Lower Canada to England. But it is not shown that any one had authority to send him from Lower Canada to Van Diemen's Land or elsewhere. The return states that Liverpool was a place which seemed fit to her Majesty, to the end that the prisoner might be transported to Van Diemen's Land. But the pleasure of the Crown, in this respect, could be signified only by some instrument, which should be set out. The assertion as to the pleasure of the sovereign, not authenticated by any responsible minister, is nugatory. Then, after the arrival of the prisoner at Liverpool, no ground is laid for the detainer, except that the gaoler states the borough gaol at Liverpool to have been the fittest and most convenient place for the detainer. But it is not shown that any warrant was issued, or any authority given to the gaoler who made the return.

Finally, the return is defective in not setting out the instruments referred to. The Court ought to see them, so as to be enabled to judge of their legal effect: it is not sufficient that the party making the return takes upon himself to allege the result. It is returned that the prisoner confessed his guilt of the treason charged against him: but the Court should see whether the confession does amount to that, and what is the treason confessed. So the pardon should be set out, that the Court may judge of its effect, and whether the conditions are imposed legally, or, at all events, within the scope of the provincial statute. So the several warrants, if they exist, should be set out. *Rex v. Clerk*, 1 Salk. 349, shows that, where there is a commitment by warrant, it must be returned on habeas corpus: "for otherwise it would be in the power of the gaoler to alter the case of the prisoner, and make it either better or worse than it is upon the warrant; and if he may take upon him to return what he will, he makes himself judge; whereas the Court ought to judge, and that upon the warrant itself." It can be proved by affidavit that the gaoler did in fact show a warrant. [*The Counsel for the Crown* objected to this being alluded to.] The rule, generally, is that the Court will look to a return only; but in the case of a return under stat. 31 Car. 2, c. 2, that rule seems inapplicable: for, by sect. 5, the party detaining is required, on demand, to give the prisoner a true copy of the warrant; and this can be only for the purpose of enabling the prisoner to check inaccuracies in the return. The act, as was pointed out in the argument in *Crowley's Case*, 2 Swanst. 8, "was designed not so much to confer new rights on the subject, as to provide new remedies for ancient rights." The Court cannot give effect to the remedy unless they see the warrant. [Lord DENMAN, C. J. In this stage of the argument, we can notice only what appears on the return.] That, at all events, strengthens the objection to the return in its present form, since it prevents the Court from seeing the true legal state of the proceedings.

The Counsel for the Crown. As to the objection that there is neither conviction nor judgment, it appears to be assumed that the detention is defended under the provisions of stat. 5 G. 4, c. 84, s. 17. But that section is material only from its distinctly recognising, by the recital, that the provincial legislatures have power to pass laws for the transportation of offenders beyond the seas, and that such convicts may be lawfully brought to England in order to transport them. The enacting part is of course inapplicable here. But it is suggested that, inasmuch

as the power to detain in England persons convicted in the colonies, and there sentenced to transportation, required a legislative enactment, such detention is illegal in all cases to which the enactment does not apply. Now the clause does not show that a legislative enactment was necessary for that purpose: the object of the whole statute is different. Sect. 10 gives the power of carrying into effect certain discipline with regard to convicts sentenced, or whose sentence has been commuted to transportation. They may be confined in the hulks; and other steps may be adopted, which could not have been taken without statute; and the object of sect. 17 is, not to confer a power of detention, but to authorize applying the particular provisions of this act to persons convicted and sentenced to transportation in the colonies, and brought to England for the purpose of carrying the transportation into effect. That they may be so sentenced to transportation, under the colonial law, is assumed; and that, being so sentenced, they may be brought to England in order to carry the sentence into effect, is also assumed as a necessary consequence. This power is not created by sect. 17; but other powers are thereby engrafted upon it. None of the English acts of parliament (a) give the power of transportation except in cases of convictions in the United Kingdom. The right (recognised by stat. 5 G. 4, c. 84) of the colonial legislatures to pass laws inflicting transportation rests, not on any express act of the English legislature, but on the authority incident to the provincial legislature, created by charter or otherwise. Stat. 14 G. 3, c. 83, s. 11, imported the English criminal law into Canada, and with it the power of transportation to the colonies. Then the legislature of Upper Canada, created by stat. 31 G. 3, c. 31, and not restricted by stat. 14 G. 3, c. 83, s. 11, has passed the provincial act 1 Vict. c. 10, part of which is set out in the return. That gives the Lieutenant-Governor the power of pardon, where the prisoner petitions, upon such terms and conditions as may appear proper. This Court does not sit on appeal against provincial statutes; nor will it rigidly inquire whether such statutes be strictly analogous to English law. Even in the case of the acts of a provincial tribunal this is not done; *Ree v. Suddis*, 1 East, 306. It is asked, whether the condition of mutilation or torture might be imposed. The objection to such a condition would be, that it inflicted a punishment unknown to the law: but how can such an argument apply to a condition inflicting a punishment known and recognized by the law as within the powers of the colonial assembly, and less severe than the punishment attached to the offence of which the prisoner confesses himself guilty? The statute cannot be void on account of the generality of its language; for, if it be true that certain punishments, though imposed as conditions, would be illegal, then it follows that the conditions contemplated in the statute do not comprehend such punishments. Suppose the prisoner had been brought by habeas corpus before a court of Upper Canada, could such an objection have prevailed? If not, how can it prevail here? Suppose an English act of parliament gave this power to the Lieutenant-Governor of Upper Canada, there could then be no difficulty: but it cannot make any difference that, the English legislature having enabled the provincial legislature to pass acts, an act has been so passed which gives the power. It is true that there is, under the provincial act, no attainder except so far as regards real and personal property. But the return is not supported on the ground

(a) See acts referred to in *Regina v. Baker*, 7 A. & E. 502, (34 E. C. L. R. 147.)

of there being any attainder at all, but as showing a power to transport resulting from the conditional pardon. The clause relating to the property was inserted to prevent the incongruity of a party holding property in Upper Canada, who had confessed being guilty of treason, and who might, under the conditions of his pardon, be transported from the province. But this, of course, does not supersede the condition.

It is contended that no man can assent to his own transportation. Without a statute, he cannot: but he can, and his assent will be good, if a statute expressly enable him to do so. Here a statute does enable him, as the condition of being relieved from a more severe punishment.

Such statutory consents are not unprecedented. In the Habeas Corpus Act, stat. 31 C. 2, c. 2, s. 14, it is enacted, "that if any person or persons lawfully convicted of any felony, shall in open court pray to be transported beyond the seas, and the court shall think fit to leave him or them in prison for that purpose, such person or persons may be transported into any parts beyond the seas," this act notwithstanding. That applies to the case of a party convicted of a felony which does not render him liable to transportation; and it enables him to consent to transportation, as it might have enabled him to do before conviction. Sect. 13 of the same statute provides "that nothing in this act shall extend to give benefit to any person who shall by contract in writing agree with any merchant or owner of any plantation, or other person whatsoever, to be transported to any parts beyond the seas, and receive earnest upon such agreement, although that afterwards such person shall renounce such contract." Here the power of a man, not accused of any crime, to "contract" for his own transportation is recognised. Pardons, in ancient times, were sometimes granted before arraignment, in order that they might be pleaded: and it is laid down in 4 Hawk. P. C. 354, Book 2, c. 37, s. 45, 7th (Leach's) edition, that "the king may extend his mercy on what terms he pleases, and consequently may annex to his pardon any condition that he thinks fit, whether precedent or subsequent, on the performance whereof the validity of the pardon will depend."

Objections are made to the exercise of the power beyond the limits of the colony. The right so to exercise it is recognized by stat. 5 G. 4, c. 84, s. 17, as before pointed out. It is incident to the general power of penal enactment. Thus, stat. 5 G. 4, c. 84, s. 3, gives power to the Crown "to appoint any place or places beyond the seas, *either within or without his Majesty's dominions*, to which felons and other offenders under sentence or order of transportation or banishment shall be conveyed." It appears to be assumed, on the other side, that a country must discharge every prisoner who comes to it under the criminal process of another country. For the reasons given, this general question does not arise here; but it may well be doubted whether the assumption be warrantable.

It is suggested that, but for stat. 11 G. 4, & 1 W. 4, c. 39, there was no power to detain prisoners who, being sentenced to transportation in one penal colony, were of necessity first landed in another. But that is not the object of the statute. It provides for the permanent detention of prisoners in either of the colonies of New South Wales or Van Diemen's Land, who, having been ordered to one of those colonies, are left in the other, either from necessity or under the provisions specified in the act. Without the statute, the penal discipline could not have been

applied to prisoners who were not in the colony to which they were ordered to be transported. The statute was passed to legalize this; not to authorize the touching at one colony in the way to the other, or the power of temporary detention there. It therefore does not show that such power did not exist independently of that statute.

It is objected that the return does not show how the power to commute punishment has passed from the Crown to the Lieutenant-Governor. But it sets out the provincial statute giving that power, as here exercised, which statute is authorized by the English act, 31 G. 3, c. 31.

Then, if the power to transport exist, it follows that there is a power to do all necessary to give effect to the condition of transportation. Here the necessity is expressly alleged in the return. The Court cannot see that the necessity of passing through Lower Canada, and by the way of England, does not exist: and, if it will take judicial notice of the physical condition of the provinces, it must see that a passage through Lower Canada was inevitable. If no ship was sailing to Van Diemen's Land except by the way of England, that was the only course of transmission; and it cannot be contended that the prisoner, when he reached the English coast, was to be left in the ship, and out of harbour. Would the objection be good, in the case of a ship with convicts touching at the Cape of Good Hope?

It is objected that no warrant, authorizing the gaoler to detain, is alleged on the return. That is necessary in the case of a committal for trial, but not in the case of a committal under criminal sentence, nor in the case of carrying the conditions of a pardon into effect. *Rex v. Clerk*, 1 Salk. 349, shows that, where there is a commitment by warrant, the return must set forth the warrant; but in that case the distinction now insisted upon in support of the return is taken; for it is said, "where a commitment is in court to a proper officer there present, there is no warrant of commitment, and therefore he cannot return a warrant *in hæc verba*, but must return the truth of the whole matter under peril of an action." That has been done here.

It is also objected that the return does not set out fully the several documents of which it alleges the effect. But the gaoler has to satisfy himself of the state of facts, and to aver the truth at his peril. Greater particularity is not required. In *Barne's Case*, 2 Rol. R. 157, it was ruled that in a return to a habeas corpus such precise certainty is not requisite, but it suffices if the Court by the return can be apprized of the substance of the matter. Here the return shows a detainer under competent authority, which is enough, as appears from *Brass Crosby's Case*, 3 Wils. 188, S. C. 2 W. Bl. 754. In *Rex v. Suddis*, 1 East, 306, the return by the Governor of Portsmouth to a habeas corpus stated that the prisoner, being a gunner in the royal artillery, in actual pay as a member of the garrison of Gibraltar, was tried by a court-martial, constituted under the authority of the king, according to the form of the statute, with power to try, hear, and determine crimes and offences in pursuance of the articles of war, "upon a certain charge exhibited against him before the same court-martial for certain offences alleged to have been committed by him at Gibraltar aforesaid;" and that the Court pronounced sentence that, having heard the evidence and defence, the Court was "of opinion that the prisoner John Suddis is guilty of receiving several pieces of printed cotton and two pieces of broad-cloth stolen from the warehouse of Mr. S. Watkins, knowing them to be

stolen, in breach of the articles of war, and doth therefore by virtue of the 4th article of the 24th section of the articles of war sentence him the said John Suddis to be transported as a convict to Botany Bay for the term of 14 years;" that the sentence was confirmed by the Governor of Gibraltar; who, to carry it into effect, caused the prisoner to be sent to England in custody, under which custody the prisoner arrived in England, and was landed at Portsmouth in such custody, and, for the cause and purpose aforesaid, was delivered by the person having the custody to the Governor of Portsmouth, to be kept till he should be sent to Botany Bay in pursuance of the sentence, and that he was detained for that purpose; that S. Watkins was a subject of the king; that no form of civil judicature existed at Gibraltar; having power to try a person in actual pay as a member of the garrison; and that the warehouse was at Gibraltar. That was held a good return. LAWRENCE, J., said, "This is a return to a writ of habeas corpus made by the person in whose custody the party is placed in execution of his sentence. He cannot be taken to be cognizant of all the proceedings. It is enough that the Court had authority to award such a sentence. He returns the cause for which he detains the party in custody, namely, the judgment of such a court. This return I believe is as much as it has ever been usual to make in such cases." And LE BLANC, J., said, "It is sufficient for the officer having him in his custody to return to the writ of habeas corpus, that a court having a competent jurisdiction had inflicted such a sentence as they had authority to do, and that he holds him in custody under that sentence."

But, lastly, supposing the return insufficient, this Court cannot discharge the prisoner. If the Lieutenant-Governor of Upper Canada had no authority to impose the condition of pardon, the prisoner is simply in the situation of a party against whom an indictment has been found for high treason within the colonial possessions of the crown. The pardon cannot stand, upon any supposition which annuls the power to impose the condition. By the Habeas Corpus Act, stat. 31 C. 2, c. 2, s. 16, "if any person or persons at any time residing in this realm, shall have committed any capital offence in Scotland or Ireland, or any of the islands, or foreign plantations of the king, his heirs or successors, where he or she ought to be tried for such offence, such person or persons may be sent to such place, there to receive such trial, in such manner as the same might have been used before the making of this act; any thing herein contained to the contrary notwithstanding." By "committed" the legislature did not mean the being convicted; for the party is to receive trial: the present case, therefore, where a bill of indictment has actually been found by the Grand Jury, would clearly be within the act. By stat. 35 H. 8, c. 2, s. 1, treasons, misprisions, or concealments of treasons, committed out of the realm, may be tried by this Court or under royal commission. In *Rex v. Kimberly*, 2 Str. 848, a party was brought up by habeas corpus, having been committed for a felonious marriage against the provisions of an Irish statute, 6 Ann. c. 16, in order that he might be sent to Ireland to be tried; and, upon its being moved that he should be discharged or bailed, the Court remanded him; and he was afterwards carried to Ireland, tried, condemned, and executed. In *Rex v. Platt*, 1 Leach, C. C. 157, a magistrate for Middlesex had committed a party for high treason done in America; that was an improper commitment; but the prisoner having applied, at a

general gaol delivery at the Old Bailey, to be bailed and discharged, the Court refused to do either. Therefore, even admitting (which may be questioned) that this Court would set at liberty persons accidentally landed in England, while detained under the criminal process of a foreign country, this will not be done when the offence is one punishable by the laws of a part of Her Majesty's dominions, where it was committed.

The Counsel for the Crown then applied to amend the return, by inserting the whole of the provincial statute, 1 Vict. c. 10. *The Counsel for the prisoners* objected, but offered to consent if all the documents connected with the transactions stated in the return, including the provincial statutes authorising transportation as a punishment, were also put in. The Court suggested that it was reasonable that the statutes should be set out, to which the counsel for the Crown assented; and the return was amended as follows.

At the beginning of the statement of the provincial act of Upper Canada, stat. 1 Vict. c. 10, between the words "Governor of the said province of Upper Canada" and the words "it was," antè, p. 256, the following words were inserted.

"Reciting (a) that there was reason to believe that among the persons concerned in the late treasonable insurrection in that province there were some to whom the lenity of the government might not improperly be extended, on account of the artifices used by desperate and unprincipled persons to seduce them from their allegiance."

At the end of the setting forth of the same statute (between the words "property real and personal" and the words "And I," antè, p. 256,) the following words were inserted.

"And (b) that in case any person should be pardoned under that act, upon condition of being transported or banishing himself from that province, either for life or for any term of years, such person, if he should afterwards voluntarily return to that province without lawful excuse, contrary to the condition of his pardon, should be deemed guilty of felony, and should suffer death as in case of felony."

"And I do further certify, that by another statute (c) of her said Majesty's province of Upper Canada, intitled 'An act to provide more effectually for the punishment of certain offences, and to enable the governor, lieutenant-governor, or person administering the government of this province, to commute the sentence of death, in certain cases, for other punishment in this act mentioned,' made and passed" 7 W. 4, "in the manner, and by the persons and authority, required for that purpose by the said act of parliament made and passed in the thirty-first year of the reign of his late Majesty King George the Third, after reciting, Sect. 1, that it was expedient to make further provision for the effectual punishment of certain offences thereafter mentioned, it was enacted, that in case of the conviction of any person after the passing of that act, of any larceny; or of manslaughter; or of any assault with intent to commit any felony; or of felonious rescue; or of assaulting with any weapon a sheriff, or other peace officer, in the execution of his duty; or of any forgery which before the passing of that act was not punishable with death, with or without benefit of clergy; or of perjury; or of fraud; or cheating; or conspiracy; or of being accessory, before or after the fact, to larceny or any other felony; or of receiving stolen goods; or of embezzlement; or of uttering or tendering in payment false or counterfeit money, resembling any of the gold or silver coins current in that province, knowing the same to be false or counterfeit; or of offences against a certain statute of that province, passed in the fiftieth year of the reign of his late Majesty King George the Third, entitled, 'An act for preventing the forging and counterfeiting of foreign bills of exchange, and of foreign notes and orders for the payment of money;' or of assisting in or attempting to effect the escape of a prisoner confined for a felony or other crime, before or after conviction;—the person convicted of such offence might be sentenced to such punishment as was then provided by law for any such offence; or if the court which was to pass sentence on such convict should think fit, might be sentenced to be imprisoned only, or imprisoned and kept to hard labour, or in solitary confinement in the common gaol, or in any penitentiary or house of correction that had been or might

(a) Statute of Upper Canada, 1 Vict. c. 10, s. 1.

(b) Statute of Upper Canada, 1 Vict. c. 10, s. 2.

(c) Statute of Upper Canada, 7 W. 4, c. 6.

be provided in that province for such purpose, for any term not exceeding seven years: provided always, that where for any of the offences above-mentioned a specified term of imprisonment was then assigned by law, no person should be sentenced, for such offence, to be imprisoned in a penitentiary or other place of confinement for a longer period than such specified term: and provided also, that in case a conviction should take place of any of the offences thereinbefore enumerated, except the offence of manslaughter, which before the passing of that act would have subjected the offender to any punishment provided by the act of the parliament of that province, passed in the third year of his then Majesty's reign, entitled, 'An act to reduce the number of cases in which capital punishment may be inflicted; to provide other punishment for offences which shall no longer be capital after the passing of this act; to abolish the privilege called benefit of clergy; and to make other alterations in certain criminal proceedings before and after conviction,—such punishment should in no case be altered or affected by that act. And (a) that no court of general quarter sessions of the peace, or court having the like jurisdiction, should have power to sentence any person convicted before them, to be imprisoned in a penitentiary for a longer period than two years. And (b) that it should and might be lawful for the governor, lieutenant-governor, or person administering the government of that province, to commute the sentence of death, which might be passed upon any person convicted of a capital crime, other than high treason or murder, and, with authority from his Majesty, upon any person convicted of high treason or murder,—for transportation for life, or term of years, to such place in his Majesty's dominions as might be assigned for the reception of convicts; or for banishment from that province for life, or any term of years; or for solitary confinement; or confinement with or without hard labour in any penitentiary or house of correction that might be appointed for such purposes, either during life, or for any term of years; and that an instrument under the hand and seal of the governor, lieutenant-governor, or person administering the government of that province, declaring such commutation of sentence, should be sufficient authority to any of his Majesty's judges or justices in that province having jurisdiction in such cases, to make such orders, and give such directions, under his hand and seal, as might be requisite for the change of custody of such convict, and for his conduct to and delivery at any penitentiary or house of correction in that province, and his detention therein, according to the terms on which his sentence might have been commuted. And (c) that the time during which any offender should have continued in any common gaol, under sentence of transportation, or under sentence of confinement in the penitentiary, should be reckoned in discharge, or part discharge, of the term which should be appointed by such sentence.

"And I do further certify that by another statute of her Majesty's said province of Upper Canada, (d) intitled, 'An act respecting the transportation of convicts,' made and passed" 7 W. 4, "in the manner and by the persons and authority required for that purpose by the said act," 31 G. 3, (c. 31), "after reciting that (e) it was expedient to facilitate the transportation of offenders to such place or places in his Majesty's dominions as might be assigned for the reception of convicts, and to make further provision in respect to the punishment of transportation: it was enacted, that notwithstanding any thing contained in a certain act of the parliament of that province, passed in the fortieth year of the reign of his late Majesty King George the Third, entitled, 'An act for the further introduction of the criminal law of England in this province, and for the more effectual punishment of certain offenders,' it should be lawful, after the passing of that act, to sentence offenders to transportation, not only in such cases where by any law then in force, or thereafter to be passed, it was expressly provided that such offenders might be transported, but also in every case in which by the provisions of the said act passed in the fortieth year of the reign of his late Majesty King George the Third, the person convicted would be liable to be banished from that province; provided always, nevertheless, that no offender should, under the authority of that act, be sentenced to be transported, except by such court, and in such cases, and for such term of time, as the same offender might, according to the said act, be banished from that province; and that nothing in that act contained should extend or be construed to take away or affect the power of sentencing offenders to be banished according to the act therein before recited, when it should appear proper to pass such sentence. And (f) that all and singular the provisions then in force which were contained in the said act of the parliament of that province, passed in the fortieth year of the reign of his late Majesty King George the Third, respecting persons returning to that province before the expiration of the period for which they had been banished by sentence of a court, or had consented to be banished according to the terms of any conditional pardon granted to a convict sentenced to suffer death, should equally extend to and be in force with respect to any person returning from transportation after that act, whether such person should have been sentenced to be transported, or having been capitally convicted, should have been pardoned on condition of being transported. And (g) that the sentence in case of transportation should be, that the offender should be transported for a time to be mentioned

(a) Statute of Upper Canada, 7 W. 4, c. 6, s. 2.

(b) Sect. 3.

(c) Sect. 4.

(d) Statute of Upper Canada, 7 W. 4, c. 7.

(e) Sect. 1.

(f) Sect. 2.

(g) Sect. 3.

in such sentence, or for life, where that might be lawful, and should in the opinion of the court passing such sentence appear proper, to such place as the governor, lieutenant-governor, or person administering the government of that province, by and with the advice of the executive council thereof, should appoint. And (a) that it should and might be lawful for the governor, lieutenant-governor, or person administering the government of that province, by and with the advice of the executive council thereof, to determine, upon reference to his Majesty's government in England, to what foreign possession of his Majesty's convicts should be transported from that province, under the provisions of that act. And (b) that an instrument under the sign manual of the governor, lieutenant-governor, or person administering the government of that province, and directed to the Judges of the Court of King's Bench, declaring to what colony or place it had been determined to transport any convict, should be sufficient authority for the Judge who passed sentence on such convict, or in his absence, for any other Judge of the said court, to make his warrant, authorising any person or persons to carry and secure such convict in and through that province, towards the sea-port or place from whence he or she was to be transported; and if any person or persons should rescue such convicts, or any of them, or assist them, or any of them, in making their escape from such person or persons as should have them in their custody as aforesaid, such offence should be punishable in the same manner as if such convict had, at the time it was committed, been confined in a gaol or prison in the custody of the sheriff or gaoler after sentence for the crime of which he should have been convicted. And (c) that the time during which any offender should have continued in gaol under sentence of transportation should be taken and reckoned in part discharge or satisfaction of the term of his transportation. And (d) that the expenses of carrying that act into execution, so far as respected the removal of convicts in order to their being transported, should be annually laid before both houses of the legislature. And (e) that if by reason of any difficulty occurring, which might prevent the transportation or reception of any convict in any colony or possession of his Majesty, the sentence which should have been passed on any such convict could not be carried into effect, such convict might be detained in prison for a period not longer than that for which he should have been sentenced to be transported, unless it should appear expedient to pardon such convict, in which case it might be made a condition of such pardon, that the convict should banish himself from that province, for a period not exceeding the residue of the time for which he was to have been transported." (f)

On Wednesday, 16th January, the return in the case of Randall Wixon, another of the prisoners, (see p. 255, *antè*,) was read. It corresponded with the amended return in Watson's case, except that the condition of pardon was, that Wixon should be transported to Van Diemen's Land, "for and during the term of fourteen years next ensuing the date of his arrival" there.

The Counsel for the prisoners then moved that Wixon should be discharged. Reliance has been placed on the recital in sect. 17 of stat. 5 G. 4, c. 84, as recognising the existence of a power in the provincial legislature to transport, and to send to England in the course of transportation. But statutory recitals are often untrue; an instance of which is to be found in stat. 59 G. 3, c. 31, s. 1. (g) The recital here is contrary to the fact, no such power existing by statute, which alone could give it; and it applies only to "some parts" of the King's dominions beyond sea. But the objection, that the legislature of Upper Canada cannot, at any rate, authorise transportation and detention beyond the bounds of the province, has not been answered. Sect. 3 of stat. 5 G. 4, c. 84, has been cited to illustrate the power of a legislature, generally, to deport beyond the limits of its own territory: but that section uses the words "transportation or banishment." The former applies to the case of prisoners being sent to places within the dominions of the legislating country: the latter to the case of their being sent to places without such dominions. In the latter case, the

(a) Statute of Upper Canada, 7 W. 4, c. 7, s. 4.

(b) Sect. 5.

(c) Sect. 6.

(d) Sect. 7.

(e) Sect. 8.

(f) By mistake, in the amended return, at the end, see ante, p. 257, it was stated, "that Leonard Watson" (instead of "Digby B. Morton") "did, on the day and year last aforesaid, deliver the said Leonard Watson," &c.

(g) See *In re Baron de Bode*, 9 Dowl. P. C. 782, 785, 788 9

power of the legislature ceases, either at once upon the prisoner being without the territory of the legislating country, or, at latest, upon his arriving within the territory of another country. In Lower Canada an ordinance was made authorising the detention in Bermuda of persons sent thither from Lower Canada: but the illegality of that order appears from the act of indemnity, stat. 1 & 2 Vict. c. 112, which was thereupon passed in the parliament of the United Kingdom. The power of the Crown to commute punishment in cases of high treason, as in other instances, appears to have been assumed for many years: but no authority can be shown for its being enforced, independently of statute, by any other means than that of avoiding the pardon, and enforcing the original judgment, in case of noncompliance with the condition. This may be inferred, in cases of felony, from *Copeland's Case*, Kelyug, Rep. Pl. Cr. 45. The service in the colonies was not merely in the nature of punishment, but also in that of labour for hire and reward. Sect. 13 of stat. 31 C. 2, c. 2, refers to such service only under contract. Sect. 14, which was also cited on the other side, refers only to transportation under a commutation of punishment imposed by the Court upon conviction. The remedy of habeas corpus is not allowed by the statute in either case; but there is no power given to the crown to enforce the agreement or condition, except by the avoidance of the pardon.

The doubt suggested, whether this country will not, as a matter of general law, aid in carrying into effect, in its own territory, the penal sentences of foreign countries, really raises the whole question which is practically before the Court. But such a doubt is unwarranted. No authority can be given for it: and such a principle is negatived by the language of Lord LOUGHBOUGH in *Folliott v. Ogden*, 1 H. Bl. 123, 135, the decision in which case was affirmed on error; *Ogden v. Folliott*, 3 T. R. 726, (see pp. 731, 733;) and also by 3 Inst. 180. When, indeed, the legislature enables the executive to deport aliens, such aliens are legally removable; but then they are so, not under any foreign law to which they may have become amenable, but under the special provisions of the domestic legislature. *Rex v. Suddis*, 1 East, 303, is inapplicable to this part of the argument; for it was assumed throughout that case that the English laws extended to Gibraltar. In the case of Upper Canada, by stat. 31 G. 3, c. 31, s. 2, the laws of the provincial legislature are valid and binding only "within the province in which the same shall have been so passed."

The provincial statute, 1 Vict. c. 10, gives no power of affixing to a pardon the condition of punishments previously illegal, or of enforcing such condition. But here is a condition of transportation to be measured from the time of the party's arrival in the penal colony, which is uncertain, and dependent upon the arrangements made by the executive of Upper Canada. Further, sect. 2 of the same statute shows that the only method contemplated of enforcing the condition of transportation was the punishment of the party as a felon, in case of his returning to the colony without lawful excuse. The clause does not in terms make the pardon void. Nor is it a necessary consequence of the condition failing that the pardon should be void: for, if an illegal condition were imposed, the Court would treat the condition as void and the pardon as single and unconditional.

From the earlier provincial statutes now set out in the return, it

appears that the provincial legislature have not understood themselves to possess the power of transportation, said to be recognised as previously existing by stat. 5 G. 4, c. 84; but consider it as given by the enacting part of that statute. For, the power having previously extended only to banishment, (a) the provincial statutes 7 W. 4, cc. 6, 7, proceeding on the authority of stat. 5 G. 4, c. 84, create the punishment of transportation, the statute having removed, as was supposed, the difficulty arising from Upper Canada being an inland province, and from the general want of power *extra fines*. [COLERIDGE, J. Stat. 5 G. 4, c. 84, so far as its enactments go, only authorises confinement in England.] The power to carry through Lower Canada might perhaps follow ex necessitate. [COLERIDGE, J. On that principle the power to transport to parts beyond the seas would authorise the carrying through Lower Canada, independently of stat. 5 G. 4, c. 84.] These suggestions would tend to show that, even since the act, the power of transportation does not exist. Further, by the provincial statute, 7 W. 4, c. 6, s. 3, the governor has no power to commute the punishment in the case of high treason. It is true that this appears to be qualified by the provincial act, stat. 1 Vict. c. 10: but the authority of the governor to assent to that is not shown. His authority is limited by his instructions; stat. 31 G. 3, c. 31, s. 30: but the instructions are not set out on the returns. This also meets the arguments which proceed on the assumption that the legislature of Upper Canada is a supreme legislature.

Then, supposing the power to exist, the return does not show that it has been lawfully exercised. The necessity of a warrant from the governor of Upper Canada, for carrying into effect a sentence of transportation, appears from the provincial statute, 7 W. 4, c. 7, s. 5. The prisoner was conveyed by the warrant of the governor of Upper Canada only "unto" (b) Lower Canada. The authority, according to the return, is then exhausted. Nothing is shown to authorise the warrant of the governor of Lower Canada, nor the act of the Sheriff of Quebec, nor that of the commander of the Captain Ross. The allegation of the Queen's determination respecting the fitness of the confinement at Liverpool is unmeaning. From the time of the arrival of the prisoner in Lower Canada, the parties employed in the transaction are not shown to have any power which any other individuals would not have had. There is not even an averment of necessity, except by the gaoler of Liverpool. It cannot be argued that irregularities in the bringing to England are cured upon the actual arrival here: England, for this purpose, is not distinguishable from Nova Scotia; and, had any individual taken the prisoner thither, and coerced his person there, he would have been justified in using violence to recover his liberty.

As to the form of the return. It is said that the Court will not expect technical nicety. But they must, at least, see that there has been something to warrant the confinement, and will not leave the whole to the judgment of the party making the return; *Bushell's Case*, 2 (T.) Jones, 13, S. C. Vaugh. 135, 6 How. St. Tr. 999, where the return was held bad for stating that the prisoner, being a juryman, had given his

(a) It was stated, in argument, that the provincial legislature, having found that sentence of transportation could not be carried into effect for want of power beyond the limits of the province, had substituted (before stat. 5 G. 4, c. 84, passed) banishment for transportation.

(b) The word appears, in Watson's case, to be "unto" in the original return, and "into" in the amended one; but, "unto" in both the original and amended returns in Wixon's case.

verdict "contra plenam evidentiā et directionem curiæ in materiâ legis." *Rex v. Suddis*, 1 East, 306, is relied upon on the other side. But, first and principally, the prisoner there was a soldier, and therefore not entitled to his liberty in the full sense of the word. Secondly, the return was more special than here. Thirdly, the absence of a warrant was not insisted on. Fourthly, the Court there clearly assumed that the record showed a trial and conviction by a court of competent jurisdiction. It is argued that *Rex v. Clerk*, 1 Salk. 349, does not apply where there is a commitment in court to a proper officer. But here no such commitment appears, nor any act of the Court, nor that of any party acting as officer of any court. In the case, *In the Matter of Power*, 2 Russ. 583, Lord ELDON directed a return to be amended, because it did not set out the whole warrant of commitment. Lastly, the Court cannot take the return as true for all the facts which it alleges, unless the prisoner have some opportunity of traversing it. His remedy by action is, in such a case as this, altogether nugatory. Sir MICHAEL FOSTER (a) expresses his opinion that, though a return to a habeas corpus is in general conclusive as to the fact, there may be exceptions, as in the case of a party about to be sent out of the country. In civil cases, which are much less important, the return is traversable under the express provisions of stat. 56 G. 3, c. 100, sects. 3, 4.

The Counsel for the Crown, contra. The power of transportation, nearly as it now exists in England, since the separation of the United States, was given by stat. 24 G. 3, c. 56. Before that act, transportation to the American plantations was the only punishment of the kind which could be legally inflicted. Then the colony of Upper Canada adopted the regulation of the English law. The power to commute in case of high treason seems to have been taken for granted in England, as comprehended in the larger power of punishment, and as a consequence of the prerogative of the Crown. The provincial statutes, 7 W. 4, cc. 6, 7, show, what was suggested in the former argument, that the provincial legislature has the power of transportation, and that the punishment is one recognised in Canada. Sect. 3 of the provincial stat. 7 W. 4, c. 6, is referred to, as showing that the governor cannot commute the sentence in cases of high treason: but the effect of the provision is, that he can do so with the assent of the Crown. But any limitation which existed is removed by the provincial act, stat. 1 Vict. c. 10, in the case of a party petitioning. The second section recognises distinctly the conditions of both transportation and banishment. It is said that the return does not show that the instructions to the governor enabled him to assent to this act: but the return alleges that the statute was duly passed and assented to in her Majesty's name. The language of the provincial stat. 7 W. 4, c. 7, s. 1, shows that, before that act, transportation as well as banishment was a recognised punishment.

It is contended that, by sect. 5 of the same act, the governor's warrant is necessary for carrying into effect a sentence of transportation. But that applies only to cases of conviction.

It does not appear from the return that the legislative council of Van Diemen's Land, acting under stat. 9 G. 4, c. 83, s. 20, &c., may not have authorised the reception of convicts there. That would satisfy the requisite of concurrent legislative provisions by the country trans-

(a) See his letters to Solicitor-General Yorke and Chief-Baron Parker, in Dodson's Life of ster, pp. 51. 57; cited 20 How. St. Tr. p. 1375, 1378, (Addenda.)

porting and the country receiving. But it is unnecessary. There is, at any rate, power to transport to Van Diemen's Land, whatever is to be done when the prisoner arrives there : and this court will not interfere during the transit.

It is argued that the provincial statute, 1 Vict. c. 10, stands upon the same footing with the ordinance respecting Lower Canada, the illegality of which is inferred from the indemnifying statute, 1 & 2 Vict. c. 112. Now that ordinance was the act, not of the legislative body, but of the special council appointed under stat. 1 & 2 Vict. c. 9 : and the whole question was, not whether the legislative body could pass such a law, but whether the particular provisions of that act authorised such a law. The ordinance too was, in itself, made against particular persons, and had no analogy to the general provisions of a statute. It was also doubted whether sect. 6 of stat. 1 & 2 Vict. c. 9, did not prevent any ordinance from having the effect of changing in any way the existing law : no such doubt could exist as to the power of the legislature of Upper Canada.

It is objected that, at any rate, the condition imposed upon Wixon is illegal, the term of transportation commencing at the time of his arrival in the penal colony. It may be that such a sentence is unusual. But, if transportation for life be not an illegal condition, transportation for any time short of life cannot be so. The condition might have been transportation for life, with a proviso that the condition should cease if the party were alive fourteen years after his arrival in the penal colony.

It is also said that an irregularity would not be cured by the party being now in proper custody. But suppose a man sentenced for any crime, and apprehended illegally ; the Court would not, when he was in the course of legally suffering his punishment, discharge him on account of the previous irregularity. There is, however, no irregularity in the mode in which the condition here has been enforced. The Court cannot treat the gaoler of Liverpool otherwise than as acting under the original authority, if competent, by which the prisoner was ordered to be transported. This appears from the judgments of LAWRENCE and LE BLANC, Js., in *Rex v. Suddis*, 1 East, 306. The return might have simply stated the original authority, passing over the subsequent matter.

It is contended that the return is bad for not showing a warrant, either if one exist, or if there ought to be one, on the authority of *Rex v. Clerk*, 1 Salk. 349. But no warrant was necessary for carrying into effect a condition accepted by the prisoner. There appears to have been no warrant in *Rex v. Suddis*. In *the Matter of Power*, 2 Russ. 583, was a case of a commitment by commissioners of bankruptcy ; and the Lord Chancellor, in consequence of the peculiar relation which that office then bore to himself, might well choose to look into the conduct of the commissioners, and not stop at the return. (a) But it would be a good return to a habeas corpus, that the party making the return was a constable, and apprehended the prisoner, who was a convict sentenced to transportation, attempting to escape, without any allegation of a warrant. Even if a private person so returned, the Court would not discharge the prisoner. Who was to grant a warrant here ? The authority of the governor of Lower Canada to further the carrying of the condition into effect arises from the general power, inherent in every branch

(a) See *Crowley's Case*, 2 Swanst. 75.

of the executive in the United Kingdom, to aid in the execution of the law. *Rex v. Suddis* was a much less strong case than this. It did not, as was suggested, turn upon the military character of the party complaining; and the return there does not even aver the necessity of his being sent from Gibraltar to London. *Folliott v. Ogden*, 1 H. Bl. 123, and the other authorities, cited to show that this country cannot carry into effect the sentences of foreign countries, are inapplicable: the dependencies of Great Britain are not, in the sense of this rule, foreign countries. And, even as to foreign countries, the law is not absolutely clear, as appears from the judgment of HEATH, J., in *Mure v. Kage*, 4 Taunt. 43.

Hill, in reply. The case of the ordinance which gave rise to the Indemnity Act, stat. 1 & 2 Vict. c. 112, has not been distinguished from the present: for, though the authority there was special, the provision was, by stat. 1 & 2 Vict. c. 9, s. 3, that it should be lawful for the governor and council "to make such laws or ordinances for the peace, welfare, and good government of the said province of Lower Canada as the legislature of Lower Canada as now constituted is empowered to make; and that all laws or ordinances so made, subject to the provisions hereinafter contained for disallowance thereof by her Majesty, shall have the like force and effect as laws passed before the passing of this act by the legislative council and assembly of the said province of Lower Canada, and assented to by her Majesty, or in her Majesty's name by the governor of the said province." This, therefore, puts the ordinance on a footing with laws passed by the legislature of Lower Canada, which legislature has the same power as that of Upper Canada. Therefore, if the ordinance could not give power to transport *extra fines*, neither could the provincial statute, 1 Vict. c. 10.

It is suggested that the power of the Crown to commute punishment in cases of high treason arises from the prerogative. It is clear, however, from *Copeland's Case*, Kelyng, Rep. Pl. Cr. 45, that there was no such power without the consent of the criminal; and that the only means of enforcing the condition was the infliction of the original punishment in case the criminal violated the condition. In 1 Chitty's Criminal Law, 789, (2d ed.,) it is said, "Transportation, or exile, is generally regarded as the next to death in the scale of punishment." "It was altogether unknown as a penalty to the common law of England. The only case in which it arose, seems to have been that of abjuration, where the party accused fled to a sanctuary, confessed his crime, and took an oath to leave the kingdom at the port assigned him, and never to return without the permission of his Majesty. This was evidently not a punishment, but a condition of pardon; for it was expressly provided by Magna Charta, that no freeman shall be banished, unless by the judgment of his peers, or by the law of the land." "Very soon after the restoration of Charles the Second, it became usual for the Crown to grant pardons, on condition that the offender should be banished, either for life, or for some limited period, and that the original sentence should be revived on his breaking the stipulations of its remission." Now, in default of its appearing, by this return, with what powers the Crown had intrusted the governor, the Court cannot assume (what, indeed, would be contrary to the ordinary practice) that the power of pardoning in cases of high treason has been delegated by the Crown to the governor.

As to the necessity for a warrant. It is assumed, as the result of *Rex v. Clerk*, that a warrant must be set out only where a warrant is issued; and here, it is said, no one could issue a warrant. If no one could do so, as indeed is urged on behalf of the prisoner, that can only be because the proceeding is illegal, and could not become legal by any warrant. *Rex v. Clerk* shows that the only case in which a warrant is unnecessary is where a Court orders the officer to act. That could not be here; for no court has acted at all. In *Rex v. Suddis*, whether there was a warrant or not, it was assumed that there had been a regular judgment of a competent Court. And this is all that *Burne's Case* (2 Rol. R. 157) shows. Besides, the return sets out a warrant of the governor of Upper Canada, which, if the power existed at all, would authorise conveying the prisoner to Lower Canada, but no farther. It cannot be held that any individual, after the prisoner arrived in Lower Canada, might take him, and carry him whithersoever such party chose, in the assumed execution of the condition, continuing or abandoning the custody at will, and so on, through any number of individuals.

Cur. adv. vult. (a)

Lord DENMAN, C. J., in the same term, (January 21st,) delivered the judgment of the Court.

We are now to pronounce our judgment on the validity of a return to a writ of habeas corpus for bringing up the body of Randall Wixon, being in the custody of the keeper of her Majesty's gaol at Liverpool. The writ was issued by my brother LITLEDALE, returnable forthwith before himself at his chambers in Serjeants' Inn; but the term was so near at hand that it was thought expedient to hear the argument in the full Court.

Every point that could arise upon the facts that appear has been amply discussed: and, as some doubt was expressed on the right of my learned brother to issue this writ, we desire to state our deliberate opinion, that he has done no more than the law justifies and requires. We deserve herein neither the praise nor the censure that may belong to innovation. We are merely abiding by an established practice.

Lord COKE, 4 Inst. 81, indeed, and Lord HALE, 2 Pl. Cr. 147, and Lord Chief Baron COMYNS, Tit. *Habeas Corpus*, (A), as text writers upon this subject, appear to confine to Chancery, which is at all times open, the officina justitiæ, the power of issuing a habeas corpus in time of vacation. But Tremaine's Pleas of the Crown contain four precedents of writs in the exact form of that now before us, earlier than 31 C. 2, one (b) as early as 43 Eliz. WILMOT, in his answer to the House of Lords, (c) refers to others anterior to the Habeas Corpus Act, and

(a) *The Counsel for the Prisoners* declined arguing as to the other returns, on the ground that none of them contained objections which did not exist in the cases of Watson and Wixon. By the returns it appeared that Watson, Walker, Parker, Wixon, Brown, Alves, Anderson, Malcolm, and Bedford, had all been indicted for high treason, and, before arraignment, had petitioned and confessed, and been pardoned on condition of transportation; Watson, Walker, Parker and Bedford, for the term of their natural lives; Wixon, Brown, Alves, and Malcolm, for fourteen years from their arrival in Van Diemen's Land; Anderson for seven years from his arrival in Van Diemen's Land. And that Grant, Miller, and Reynolds had been capitally convicted and sentenced to death; Grant for high treason, and Miller and Reynolds for felony, (not specifying the treason or felony;) and that these three had been pardoned on condition of transportation to Van Diemen's Land for life.

(b) *Rex v. Gardner*, Trem. Pl. Cr. 354. See post, p. 283, note (a.) For other instances see Trem. Pl. Cr. pp. 366, 387, 405.

(c) See Opinions, &c. by Sir J. E. Wilmot, pp. 94 to 102, &c.

observes that the great men who framed it would never have left so obvious a defect without remedy. In 1758, he and the Judges consulted by the House of Lords affirmed this power; and the reforming bill which had been introduced would scarcely have been suffered to fall, had it not been in that respect deemed unnecessary.

In 1765, then, Blackstone's statement, 3 Com. 131, is a valuable testimony of the general opinion at that time: and the practice from that period has been uniform. It is also true that, in deciding *Crowley's Case*, 2 Swanst. 1, Lord ELDON doubted the power of a Judge in vacation to issue a habeas corpus, saying, there is much good principle for it, but very little practice. That doubt assisted his argument in favour of over-ruling the solemn decision of Lord NOTTINGHAM in *Jenkes's Case*, 6 How. St. Tr. 1189; and in *Crowley's Case*, 2 Swanst. 12, 83; but the passages in his judgment, which occur at page 65 and page 68, 2 Swanst., distinctly prove that he formed his opinion partly on the inconvenience and oppression which might have accrued to the subject if deprived of the means of obtaining a release from imprisonment in time of vacation by a writ sued out in the Court of Chancery. Now the same ill consequences would follow in criminal cases, notwithstanding the power of issuing these writs in vacation by Chancery, unless the Judges of the Court of King's Bench have power to decide immediately on the right to restrain a subject of his personal freedom. In favour of this practice we have the authority of Lord NOTTINGHAM himself; who, in his judgment, preserved by Mr. Swanston, mentions that precedents of such writs being issued by KELYNG, C. J., were brought before him. He says, indeed, that RAINSFORD, then C. J., had refused a habeas corpus to Jenkes; but not because he doubted his power to do so. It is far more likely he did not choose to enter into a controversy with the Privy Council by whom Jenkes had been committed. (a)

In fact, therefore, there is no decision against this doctrine; and in its favour great authority, principle, necessity, and very early precedents, continued to the present hour.

We proceed, then, to examine this return, which, in substance, is that, after the insurrection in Upper Canada was suppressed last year, the legislature authorised a pardon to be granted by the Governor to such persons charged with high treason as should before arraignment confess their guilt, and petition for a pardon, on such conditions as should seem fit; that Wixon was so charged, and so pardoned, on condition of being transported to Van Diemen's Land for his life; (b) that, for want of the means to convey him thither directly, he was first taken to Quebec in Lower Canada, then embarked to England, and there kept in safe custody in Liverpool gaol, being a secure and convenient place for the purpose of detaining him, while necessary preparations were made for transporting him, in fulfilment of the condition of his pardon.

Some general observations are material to be made. The return must necessarily be received as true in all the particulars that appear upon it in the present stage, in which its sufficiency alone is examined. We are sitting as on a demurrer, or a writ of error on the judgment of another court.

We must also bear in mind that the matter for our consideration is,

(a) See *Crowley's Case*, 2 Swanst. 46, 83.

(b) This was the condition in Watson's case.

not the code by which the law of this country may *require* its ministers to proceed in certain cases; but whether, under the circumstances of this prisoner, he can justly complain that he is injured and has a right to be set free. Obviously there is a broad distinction between the duties which a state may enjoin on persons in authority for purposes of its own, and the powers of which it may permit the exercise for any lawful purpose.

The difficult questions that may arise touching the enforcement in England of foreign laws, are excluded from this case entirely; for Upper Canada is neither a foreign state, nor a colony with any peculiar customs. Here are no *mala prohibita* by virtue of arbitrary enactments; the relation of master and slave is not recognised as legal: but acts of parliament have declared that the law of England, and none other, shall there prevail. The consequence is, that we can take judicial notice of their legal proceedings, can understand the language they employ, and must, according to all former practice, make every reasonable intendment in support of their validity.

The legislative act, under which the pardon was granted, was, however, said to be absolutely void for two inherent vices.

First, that, by the law of England, no man can contract for his own imprisonment. This dictum of HOBART, C. J., in *Foster v. Jackson*, Hob. 61, (5th ed.), citing *Clark's Case*, 5 Rep. 64 a, founded on older authorities, and on principle, was cited by Mr. *Hargrave* in his celebrated argument in *The Case of James Sommersett*, 20 How. St. Tr. 50. It made out his point that, even if the negro had sold his freedom, our law would hold the bargain void; but it really has no application to the case of a man charged with a crime, but permitted by the law to confess it before arraignment, and so enabled to obtain a pardon, by which his life is spared, but he binds himself to undergo a less severe punishment.

The second objection was to the enactment that persons may be pardoned *on such conditions as may seem fit*, as if it introduced a power of punishing in a manner unheard of in our procedure, and would legalize even torture and mutilation. But we are of opinion that these barbarous practices are impliedly excluded from the enactment, unless it should actually express them. There is no doubt that transportation was intended; for that mode of punishment is mentioned in the second section of the same act. It appears from former acts passed in Canada to have been in force there; and stat. 5 G. 4, c. 84, s. 17, proves the frequency of transporting to the penal settlements for offences committed in certain colonies belonging to Her Majesty; while it is notorious that the substitution of that punishment for the loss of life has been constantly, during a long course of years, an acknowledged practice in this country.

Another objection drawn from a different provision of the act, that the pardon was made equivalent to an attainder in respect to property, and therefore could not affect the person, was not much pressed; as this proceeding is in no degree connected with the principles of attainder.

Objections were raised to the condition of the pardon, both in respect to the time and the place of transportation. The time is fourteen years, to be reckoned from *the arrival of the party* in Van Diemen's Land, thus depending on accident, or perhaps postponed by wilful delay, and

void for the uncertainty. The answer given at the bar appears to us satisfactory; that, as the transportation may be for time of life, it may *a fortiori* be for *any* shorter period.

It was then said that the power to receive the convict at Van Diemen's Land, the place of his destination, ought to appear in the letters patent granting the pardon. We do not think it necessary. Her Majesty has power by law to make that settlement a receptacle for persons transported under sentence, or after a commutation of their punishment; and we can have no difficulty in presuming that all due preparations and provisions for that purpose have been made.

The return was challenged for the want of every one of the numerous documents whence the right to imprison was inferred. The indictment for treason, it was contended, ought to have been recited, if not set forth in terms: the petition, the confession, the pardon, the assent, though that indeed is not required by the act. We were told that it was our duty to inspect these papers, and not receive a merely general description from the party imprisoning, that we might judge for ourselves whether the description was correct, and whether they really conferred the authority ascribed to them. To this manifold objection one answer must serve. The fact is stated to the Court upon the return: and we are bound to receive it as true. The party who makes the return has probably never seen the documents, but, at his peril, places his confidence in the captain who brought the prisoners from Canada, or in some other person: but he is bound by the assertion which he makes on their credit; and their truth may be questioned in any ulterior proceeding which it may be competent to the party to adopt.

The last head of objection is that the authority to transmit the prisoner to the various custodies in which he has successively been placed does not properly appear. The treason was committed in Upper Canada; and there confession was made, and the conditional pardon granted.

How, then, it is asked, could the Governor of Lower Canada be justified in receiving him, and in transmitting him to England, and how can the gaoler of Liverpool restrain his person in this country? The more especially, as Sir John Colborne's letters patent are directed in terms to *such person in England as may be lawfully authorised to receive him*; and no warrant is even pretended to have been directed to the gaoler of Liverpool, nor does he even allege himself to be a person answering that designation.

We answer that, as soon as the conditional pardon had been granted on the prisoner's petition, the Crown had a right to enforce the condition, and to take all necessary steps for that purpose. The circumstances confer the authority; and no warrant could enlarge it.

Sir John Colborne, whose letters patent are addressed to persons having authority to receive, had in himself no more authority to receive than the person who now detains the prisoner. As it is physically impossible to embark at once for Van Diemen's Land from Upper Canada, in every intermediate territory where the prisoner was confined in the necessary performance of the condition to which he had lawfully bound himself, he was lawfully confined. And stat. 5 G. 4, c. 84, in the section before quoted, shows that transports from the colony on commuted sentences had been habitually received in England in their passage to the penal settlements.

The result is, that the person making this return is justified in rendering his assistance to the captain of the vessel which has brought the prisoner from Lower Canada in detaining him, and to such other person as may be employed to carry him to Van Diemen's Land; and that the prisoner must be remanded to his custody.

We have selected the case open to the most numerous objections for our first judgment. Eight others, (a) namely, Watson, Walker, Parker, Brown, Alves, Anderson, Malcolm, and Bedford, must be disposed of in the same manner, for substantially the same reasons.

Three, Grant, Miller, and Reynolds, have not been pardoned under the Legislative Act; but, according to the ordinary practice as stated in the return, after being *duly convicted* at a court of session and oyer and terminer at Niagara in Upper Canada, one of them of treason, the other two of *felony*. We have carefully considered whether these allegations are sufficient; and, on the principles already stated, we think they are. On this point we rely on the principle laid down in *Barne's Case*, 2 Ro. Rep. 157, (b) that returns to the writ of habeas corpus do not require minute correctness if the substance of the facts is stated; and on the precedent acted upon in *Rex v. Suddis*, 1 East, 306, where similar allegations, but still looser, were sanctioned and held good. These then must also be remanded.

Prisoners remanded.

Hill then moved, first, that the gaoler might be directed to verify his return by affidavit, or that, in default of his doing so, the prisoners might be discharged; secondly, for a rule for an attachment against him for a false return.

As to the first point. It is clear that, unless there be some method of contesting the truth of the return besides an action for a false return, the remedy by habeas corpus is illusory. And the case is the stronger, when, as here, the prisoners will be sent beyond the sea if the proceedings of the gaoler be upheld, and when the gaoler cannot by possibility have acted on his own knowledge. The remedy is said to be "complete for removing the injury of unjust and illegal confinement;" 3 Bl. Com. 133—138; whereas, if the return be conclusive, the remedy is not only incomplete but nugatory. In *De Vine's Case*, (c) in 34 H. 6, a prisoner pleaded to a return, and the party returning replied to the plea; upon which the prisoner was remanded. It appears that the judges, among whom was *FORTESCUE*, C. J., were the advisers of the Lord Chancellor in this proceeding. In *Sir William Chancey's Case*, 12 Rep. 82, it appears that the return to a habeas corpus was held bad for a reason (among others) which would appear on looking out of the return; namely, that the High Commission, under which the parties acted, could not be executed by four, which was the number of commissioners making the warrant under which the imprisonment was justified. In *Hutchins v. Player*, O. Bridgm. 272, (d) the Court looked into numerous matters extrinsic to the return, to see whether the custom set out in the

(a) See p. 732, *antè*.

(b) See also *Hutchins v. Player*, O. Bridgm. Rep. 287.

(c) Cited in *Hutchins v. Player*. O. Bridgm. 288, from a Register Book of the city of London, called *Liber Dunthorne*. See O. Bridgm. p. 305. Also pp. 276, 295, 308.

(d) "The Court may remand at their discretion, and inform themselves of the charters, evidences, and other matters *ab extrâ*." Ib. p. 289.

return was good. In *Seint John's Case*, 5 Rep. 71 b, (a) it seems that there was a plea to the return in the nature of a confession and avoidance, alleging, as a new fact, that the prisoner was a sheriff's bailiff; for which cause he was held justified in doing that for which he was fined and had been imprisoned on non-payment. In *Swallow v. The City of London*, 1 Sid. 287, there seems to have been a discussion whether the prisoner should be allowed the benefit of a fact not pleaded; (b) but the Court gave him the benefit of the fact. In *Dodson's Life of Foster*, p. 53, (c) is an account of *Rex v. White*, which was a case of impressment under stat. 18 G. 3, c. 10. The Court there allowed affidavits to be read on each side, though they said it was not usual; for that the prisoner there had no other remedy: and the prisoner was discharged, though the return was good on the face of it. Mr. Justice FOSTER, as appears by his letters to Solicitor-General Yorke, (Life, p. 51,) and Chief Baron PARKER, (p. 57,) considered the rule, that a return was conclusive as to the fact, liable to exceptions, particularly where the party was to be sent beyond sea. In the latter letter, he adverts particularly to the tenth question proposed by the House of Lords to the Judges in 1758, 4 Bac. Abr. 140, (7th ed.) *Habeas Corpus*, (B) 13, (note,) 15 Parl. Hist. 903. The majority of the Judges there held the return not absolutely conclusive; but several of them, among whom was WILMOT, J., (d) limited the power of the Court to look beyond the return to cases where the falsehood of it should appear by verdict or judgment on demurrer in an action for a false return. WILMOT, J., seems to admit that a prisoner may confess and avoid, though not traverse. But such a distinction seems inadmissible: for a plea to the return must be liable to traverse, and if so, why not the return itself? In 1758 the reports of Sir O. Bridgman had not been published; therefore neither *De Vine's Case*, (cited in *Hutchins v. Player*, O. Bridgm. 288,) nor Bridgman's view in *Hutchins v. Player*, O. Bridgm. 272, were known. In *Goldswain's Case*, 2 W. Bl. 1207, the Court took into consideration the affidavits on which the habeas corpus was obtained. And GOULD, J., said, "I do not conceive, that either the Court or the party are concluded by the return of a *habeas corpus*, but may plead to it any special matter

(a) It does not appear from Coke that there was any habeas corpus in that case; but see S. C. as *Gardener's Case*, Cro. Eliz. 821. See the record in Trem. Pl. Cr. 354, *Rex v. Gardener*: whence it appears that the prisoner Gardener appeared in Court on recognizance, cravedoyer of the writ and return, and then "dicit quod ipse non intendit" &c., denying the right of the Queen and the informer to the fine, for the non-payment of which he was committed, "quia dicit quod," &c., and then setting out the special matter, and his being charged with the duty, (which did not appear before,) "et hoc paratus est verificare unde petit judicium et quod ipse de premissis per curiam hic dimittatur." The Queen's coroner, "viso placito predicti Johannis Gardner et per ipsum bene intellecto pro eo quod satis sibi constat per relationem et testimonium diversorum fidelium subditorum dictæ Domine Regine" that Gardner did the act complained of in his own defence and for the better execution of his warrant, modo et formâ as by him above pleaded, confesses the truth of the plea. Whereupon "consideratum est quod predictus Johannes Gardner de premissis eat inde sine die," &c.

(b) "Après le ret' file fui move p luy daver liberty de plead al ret' car comt fuit agree que matter contr' le ret' ne poet ee plead mes party est mise al son action pur le faux ret' unc' fuit dit que matt' que estoit ove le ret' poet ee plead acil. admittant que le City de London ad tiel custome unc' (coment Freeman la) ne serra lie per ceo, quia il est un des Moniers le Roy," &c. The Court remanded the prisoner, and directed that the privilege should be suggested in the Crown Office, like a suggestion in prohibition on the plea side; and such suggestion was accordingly filed.

(c) See also 20 How. St. Tr. 1376. (Addenda.)

(d) See Notes of Opinions, &c., by Lord Chief Justice Wilmot, p. 105.

necessary to regain his liberty." It may be argued that, as stat. 56 G. 3, c. 100, s. 3, enables judges to inquire into the truth of the return in cases of confinement (sect. 1) "otherwise than for some criminal or supposed criminal matter," inquiry is, by implication, excluded, in cases like the present. But, first, as is said by Lord ELDON in *Crowley's Case*, 2 Swanst. 68, "if the prerogative of the king cannot be affected by general words in a statute, will a British court of justice permit it to be said, that a statute designed to enforce in particular instances the prerogative in favour of the liberty of the subject shall deprive the subject of that liberty in any case?" Secondly, the words "criminal or supposed criminal matter" must be understood in the same sense as in the preamble to the statute in *pari materia*, 31 C. 2, c. 2. Now, by sect. 3 of that act, it appears that these words apply only to cases where parties are detained with a view to trial; for an exception is made of "persons convict or in execution by legal process." The words in the preamble, therefore, clearly mean only persons awaiting trial; and consequently the exception in stat. 56 G. 3, c. 100, must be confined in the same manner. But, further, the Court here may act on its common law powers of remedying an evil in a summary way. Formerly parties were put to plead privilege of parliament, *femes covert* to plead coverture, and the like. But the Court now interferes upon motion to relieve such parties, the facts being before them on affidavit. So, on the other hand, in *Rex v. Marks*, 3 East, 157, the return to a *habeas corpus* showed an informal warrant of commitment: but, the depositions returned showing a *corpus delicti*, the Court discharged and recommitted the prisoner, taking upon themselves to remodel the commitment.

Then, if the truth of the return be disputable, it follows that the party making it is to establish the truth; and it cannot lie on the party imprisoned to negative the cause of his detention.

In support of the motion for an attachment, *Hill* produced an affidavit by the clerk of the attorney for the prisoners, stating that he, the clerk, received from the gaoler, on 29th December, 1838, the following document:—

"Province of }
Lower Canada } (Seal) J. Colborne.

"Victoria, by the grace," &c.

"To Digby B. Morton, master of the bark Captain Ross. Whereas, under and by virtue of a certain warrant of his Excellency Sir George Arthur, K. C. H., Lieutenant-Governor of our province of Upper Canada, and Major-General commanding our forces therein, bearing date, under his hand and seal of office, at Toronto, in the said province of Upper Canada, the 5th day of November, in the present year of our Lord, 1838, in the second year of our reign, I am Anderson," &c. (here followed a list of twenty-one, including all the twelve prisoners except Miller and Reynolds), "severally indicted and convicted in due course of law, in the courts of the said province of Upper Canada, of the crime of high treason, and Linies (a) Wilson Miller," and "William Reynolds," (and two others,) "in like manner severally indicted and convicted of the crime of felony, and Edwin Merritt in like manner indicted and convicted of the crime of murder, to all of which said persons and convicts our gracious pardon hath been extended, upon condition, nevertheless, that they and each of them be transported and remain transported to our penal colony of Van Diemen's Land for and during the period named in the patents of pardon so as aforesaid granted to the said convicts and each of them: And, whereas the said several persons and convicts are, (b) by and under a warrant in that behalf of his Excellency Sir John Colborne, our administrator of the government of our said province of Lower Canada in that behalf, are now in the custody of our sheriff of the district of Quebec in our said province of Lower Canada, in order to their transportation as aforesaid: And whereas we being willing that

(a) The names were incorrectly spelt in this and other instances.

(b) Sic.

the bodies of the said Ara (a) Anderson," &c. (omitting Leonard Watson, and naming all the other twenty-five,) "and of each and every of them, now in our common gaol of our district of Quebec, should be directly delivered to you to be transported to Van Diemen's Land, being one of our penal settlements and foreign possessions, we have, by our writ in that behalf addressed, lately commanded our said sheriff that he should deliver the said Ara Anderson, &c. (the twenty-five without Leonard Watson,) "and each and every of them to your custody, without delay to be transported as aforesaid, we therefore command you receive the said Ara Anderson," &c. (the twenty-five without Leonard Watson,) "and each and every of them, from our said sheriff of our said district of Quebec, and that you do forthwith transport and convey, or cause to be transported and conveyed, the said Ara Anderson," &c. (the twenty-five without Leonard Watson,) "and each and every of them, to such part of the United Kingdom of Great Britain and Ireland called England as to us may seem fit, to the end that the said Ara Anderson," &c. (the twenty-five without Leonard Watson,) "may be thence again transported to our penal colony of Van Diemen's Land, according to the condition in our aforesaid pardons severally and respectively in that behalf contained, and that you do there deliver the bodies of the said Ara Anderson, &c. (the twenty-five without Leonard Watson,) "and the body of each and every of them, into the custody of such person or persons as may be lawfully authorised to receive the same.

"In testimony whereof, we have caused these our letters to be made patent, and the Great Seal of our said province of Lower Canada to be hereunto affixed.

"Witness our trusty and well-beloved Sir John Colborne, Knight, Grand Cross," &c., "Commander in Chief of our forces in our province of Lower Canada," &c.

"At our government house, in our city of Montreal, in our said province of Lower Canada, the 17th day of November, in the year of our Lord, 1838, and in the second year of her Majesty's reign.

"By command,

"D. Duly,

"Sec'y of the Province."

That this document was so delivered to the deponent in consequence of his having demanded to be furnished with a copy of the warrant of commitment under which the twelve prisoners now brought up, then in the gaoler's custody, were detained by him; and that the deponent examined the document with the original warrant of commitment then in the custody of the town clerk of Liverpool. That deponent was informed, both by the gaoler and town clerk, that the prisoners were held in custody solely on the authority of the warrant, and that they had no other document or warrant whatsoever connected with the prisoners. That, in answer to deponent's request to know what return would be made to the writ, deponent was informed, both by the gaoler and town clerk, that the return would be made by setting out the warrant under which the prisoners were detained. That, at the time of the return in Watson's case being read in court, (14th January,) the deponent saw the original returns which had been prepared by or on behalf of the gaoler; and that the return in Watson's case simply set out the warrant. That the deponent communicated the receipt of the copy of the warrant to the attorney for the prisoners; and that the instructions to the counsel consisted of a copy of the warrant, among other things.

Lord DENMAN, C. J. With regard to the proposition that the return should be supported by affidavits, there appears to be no authority for saying that this has ever been held necessary, or that in practice it has ever been done. We should not be justified in introducing any new practice. Other securities are provided by the law: if they should unfortunately prove insufficient, that would not authorise our establishing a new practice.

As to the motion for an attachment, I think the Court ought to be extremely careful that the facts should be truly stated to them. I do not enter into the question, how far the warrant is material: for I think that no such minute enquiry ought to be made upon such a subject. If

(a) The names were incorrectly spelt in this and other instances.

we find that an untruth is stated, that is a sufficient *primâ facie* case to induce us to call upon the party making the statement to account for the untruth.

LITLEDALE, J. A party imprisoned has two modes of proceeding either by action for false imprisonment, or by application for a habeas corpus. In an action for false imprisonment the defendant must prove his justification, if any; and (except where allowed by express provision to give it under the general issue) he must also set forth the justification specially on the record. In the return to an habeas corpus no such minuteness of detail is necessary; nor in any instance that I can find has it been considered necessary to support the return by affidavit.

On the other point, I think the gaoler should be called upon to account for the statement which he has made contrary to the fact.

WILLIAMS, J. As to the first point, the return to an habeas corpus *primâ facie* imports verity; that appears from the opinion, which has been cited, of Mr. Justice FOSTER, from *Rex v. Clark*, 1 Salk. 349; *Rex v. Suddis*, 1 East, 306, and *Ex parte Krans*, 1 B. & C. 258, (8 E. C. L. R. 70.)

COLERIDGE, J. As to the second part of the application, it is merely necessary to say that this is a rule nisi; and that the Court, abstaining from prejudging the question, requires a public officer, who appears, *primâ facie*, to have made an untrue statement, to show how it is that he has so dealt with the Court.

On the other point, a great deal was urged by Mr. Hill, as to the illusory nature of the remedy by habeas corpus, unless his view be sustainable. To which I will merely answer that the history of England shows that that judge does best for the liberty of the people who does not indulge in speculations of his own to the extent of straining the law, for the purpose of affording a supposed benefit, but adheres to the law as he finds it, however defective it may be: for, if it be defective, that is sure to lead to an improvement in the regular and constitutional mode. Mr. Hill's position is, not simply that the truth of a return may be controverted either by plea or affidavit, but that, in the first instance, the party filing the return is bound to support it by affidavit. Now, not a single authority cited, from the time of Henry VI. down to that of Mr. Hargrave, in the slightest degree bears that out in terms. In Sir *William Chancey's Case*, 12 Rep. 82, the report does not show that more was decided than that the return was informal on the face of it. And, further, I apprehend that cases of privilege may stand on a different footing from ordinary cases, and that the Court may, *ex officio*, there institute an enquiry of its own. But the great current of authorities is the other way. Perhaps, indeed, in the earlier cases, the party was at liberty to controvert the facts by plea. At a later period, as Mr. Justice FOSTER shows, the practice of filing affidavits was in some instances allowed; but he does not go on to say that it was incumbent on the party who filed the return to support it in the first instance by affidavit. Considering what his opinions generally were, I think it must be taken for granted that he had not found any authority to make that position good. Mr. Hill is compelled to urge that the Court is bound in justice to shift the onus from the party controverting the return to the party making it. For this no authority has been cited; and I think the Court cannot go to that extent.

Ordered, that William Batchelder, keeper of the borough gaol of Liverpool, "show cause why a writ of attachment should not issue against him, for his contempt in making a false return to a writ of habeas corpus," &c.

In answer, affidavits were put in. One was by S. J. Blunt, a clerk in the Colonial Office, deposing that, about 18th December, 1838, a dispatch was received from the Lieutenant-Governor of Upper Canada, addressed to Lord Glenelg, one of Her Majesty's principal Secretaries of State, containing the pardon of Watson and others. The pardon, which was annexed to the affidavit, was by letters patent under the Great Seal of Upper Canada, and signed and sealed by Sir George Arthur, Lieutenant-Governor of the province. It recited the enacting part of the provincial statute, 1 Vict. c. 10, s. 1, (see *antè*, pp. 255, 256), and that Anderson, Brown, Watson, Wixon, Alves, Walker, and Parker were indicted for certain high treasons, (which were specified,) and had each petitioned, confessing his guilt, professing penitence, and praying for mercy; and that the Lieutenant-Governor, by advice, &c., had consented on conditions severally specified in the pardon, (corresponding with the several returns.) Then followed the operative part of the pardon, corresponding with the terms of the recital. Blunt also deposed that, about 6th November, 1838, Lord Glenelg received a dispatch from Sir George Arthur, dated 12th October, 1838, stating that some of the traitors concerned in the late rebellion would be forthwith removed to England, for the purpose of being transported to New South Wales or Van Diemen's Land, and would be removed to Quebec, from whence the Governor would direct their removal to England. That, about 18th December, 1838, Lord Glenelg received another dispatch from Sir George Arthur, dated 6th of November, 1838, transmitting a list of convicts pardoned on condition of transportation, who were to be sent to Quebec in order to be conveyed to England; in which list was contained the name of Watson, along with those of twenty-four of the other persons mentioned in Sir John Colborne's warrant of 17th November, 1838; (a) and that, in the list, Watson was described as one of the prisoners transported to Van Diemen's Land, under the provincial act, for life. Blunt further deposed that he believed Watson's name to have been omitted in the mandatory part of the warrant by a clerical mistake only. The gaoler deposed that he received thirty-four persons, including the prisoners, from the commander of the Captain Ross, into his custody, by the direction of the mayor and other magistrates of Liverpool; that the commander, when he delivered them into his custody, called over their names, and, among them, that of Leonard Watson; that no warrant was then delivered to him, but he received Sir John Colborne's warrant the same day from the town clerk of Liverpool, which warrant he again left for the use of the town clerk in his communications with the government: that he had occasional possession of it afterwards, but it was for the most part in the town-clerk's custody for the purpose aforesaid; that he finally received it from the town clerk's office the night before he came to London with the prisoners; that he brought the warrant and the writs of habeas corpus with the prisoners to London on the 9th January last, having directions to keep the prisoners in safe custody, and to deliver his papers to the London agent of the town clerk, which he accordingly did; that on the 14th January he signed certain returns,

(a) The "letters patent" of that date, mentioned in the return.

which he understood had been prepared by counsel; and that he did not know, until after they were filed, that Watson's name was omitted in any part of the warrant; that he was aware that the prisoners' attorney had possession of a copy of the warrant; that he had no intention of stating any thing as being in the warrant which was not there; and that the return, mentioned in the affidavit in support of the rule, was prepared by the town clerk of Liverpool, and was not, to deponent's knowledge or belief, withdrawn, and the other return prepared, with any intention of preventing the Court from knowing the terms of the warrant, or of depriving Watson of the advantage of any objections to it.

The clerk to the London agent of the town clerk deposed that he received from the town clerk those returns that had been prepared, with instructions to show them to the solicitor to the Treasury, and consent to any alterations which he, or the counsel for the Crown, on behalf of the gaoler, might approve of; that the returns were laid before the solicitor, and other returns prepared or approved of by the counsel for the Crown, and signed by the gaoler. The solicitor to the Treasury deposed that he instructed the counsel for the Crown to prepare the returns, and that his instructions contained a list of the prisoners, including Watson, and a copy of the warrant; and that he did not, in his instructions, advert to the fact that Watson's name was there omitted; that two returns were prepared, one for each class of cases, (one in the case of Malcolm and the other in the case of Grant,) which were used as precedents for the other returns; that neither he, nor, as he believed, the counsel for the Crown, was aware that Watson's case differed from that of other prisoners, so far as respected the warrant; that there was no intention to state any thing as being in the warrant which was not there; that the counsel for the Crown considered the return originally prepared incorrect, and thought it right that another should be prepared, setting out fully and truly the circumstances under which the prisoners were brought to England and detained in the gaoler's custody, and deemed it not only unnecessary but improper that all the documents should be stated at length upon the returns; that the return which was filed did not omit to set forth the warrant at full length with any view of concealing the omission of Watson's name, or depriving him of any benefit that he might derive therefrom. In this term, Wednesday, January 23d,

The Counsel for the Crown showed cause. The affidavits negative any criminal intention in the gaoler, and show that he did not know of the omission of the name. He was bound to take care that the return was legally drawn. The return as originally framed would have been incorrect in law and fact. The warrant of Sir John Colborne was not that under which the gaoler detained the prisoners. After the master of the Captain Ross had delivered them over, the warrant had been obeyed, and had expired. But it was, at every step, an immaterial document, so far as the gaoler was concerned. It was not necessary to allude to it at all in the return. The judgment on the motion to discharge the prisoner shows that the parties might have been brought to England, and there detained, without any such warrant: and, even if their conveyance to England had been irregular, their detention is now legal. Watson is therefore not injured by the act complained of. It is pressed upon the Court that, if the motion fail, the remedy by habeas corpus is illusory. But any new facts, not inconsistent with the return, might be

pleaded; and, if the return itself were shown by affidavit to be wilfully false, the Court would quash it.

It is now prayed, on the part of the Crown, that the Court will amend the return by striking the warrant out altogether, and making the return conformable to the facts which now appear.

The Counsel for the prisoners, contra. It is unimportant, so far as the present motion is concerned, whether Watson have or have not suffered by the untruth. If an unauthorized person were to execute a party convicted of murder, this would be murder. The Court will require every person making a statement to adhere carefully to the fact. The gaoler has at least been guilty of a culpable negligence. Besides, the inaccuracy now appearing to the Court, the *prima facie* presumption as to the truth of the return is met. Further, it is not true that Watson has suffered no injury. It was important to him that the Court should see the whole proceeding. The fact now appears to be that one step in the transactions has been a warrant, which, besides that it is legally informal, and also unintelligible, (the recital containing no predicate,) does not mention Watson's name in the operative part. It is argued that this is immaterial, inasmuch as it was not necessary to mention the warrant at all. That, however, was not precisely decided by the Court: and, on the authorities adduced in the former argument, it clearly is a material document. At common law no one could be exiled or banished except in case of abjuration, or by authority of parliament; Co. Lit. 133, a. This appears also from *Newsome v. Bowyer*, 3 P. W. 37, and 1 Blackst. Com. 137. Therefore, in the case of a common law pardon, there are no means of enforcing the condition, but by enforcing the original sentence. In an *Anonymous Case* in Comberbach's Reports, p. 16, it is said, "A pardon of felony, with a clause of transportation, was allowed, and the party discharged, without finding sureties: but per Astry, the usual course is to insert the clause for finding sureties to transport himself within such a time; but, per Cur', he ought to *transport himself* within the time, *at his peril*." Then that is the situation of the prisoners; for there is no statute enforcing transportation, except in the two cases of convicts sentenced to transportation, and pardoned on that condition after conviction. Therefore nothing but a warrant can justify the detainer. "To make imprisonment lawful, it must either be by process from the Courts of judicature, or by warrant from some legal officer having authority to commit to prison; which warrant must be in writing, under the hand and seal of the magistrate, and express the causes of the commitment, in order to be examined into (if necessary) upon a *habeas corpus*. If there be no cause expressed, the gaoler is not bound to detain the prisoner." 1 Blackst. Com. 137. There was no reason, in the present case, why the prisoner should not have been brought to trial: he might then have pleaded the pardon, and would not have lost the benefit of it, even if he had pleaded Not Guilty; Jenk. 3 Cent., Ca. 62, (p. 129, ed. 2.) Then it is argued that at any rate the irregularity is now cured. But for that there is no authority. In *Rich v. Doughty*, 3 Salk. 149, it was held that where a prisoner, who had escaped, was re-taken by virtue of a legal escape-warrant upon the statute 5 Ann., by a rabble, and not by an officer, as the statute directs, the sheriff could not on *habeas corpus* justify the detainer, since the warrant, though good, was illegally executed.

Sir John Campbell, Attorney-General, by permission of the Court,

was heard in reply as to the materiality of the warrant. *Rich v. Doughty*, 3 Salk. 149, is from a book of no authority; and the report is manifestly inaccurate, the case, according to the report, having occurred in 3 Ann., but being decided on stat. 5 Ann. c. 5. (a) Stat. 5 Ann. c. 5, is upon another matter: perhaps the statute referred to was 2 stat. 1 Ann. c. 6, which relates to the escape of prisoners in custody upon mesne process or execution in civil cases, or contempt. (b) Such prisoners, if illegally retaken, cannot be detained: but this has nothing to do with prisoners under criminal process. The authorities cited show that, at common law, there is no such punishment as transportation. That, however, does not show that, when a party receives a pardon on condition of transportation, the transportation cannot be enforced. There were many such pardons in the case of the treasons committed during the rebellion of 1745: (c) no party so pardoned could have been discharged upon *habeas corpus*. But, however that may be, this is the case of a statutory enactment by a legislature recognized in this country. The case stands on the footing of a custody in criminal execution; where, as admitted, no warrant is necessary.

LORD DENMAN, C. J. This attachment is moved for on the ground of the gaoler having committed contempt, in deceiving the Court by a false description of the warrant under which he received the body of Leonard Watson. I agree that, if there were any thing like a wilful falsehood committed, it would be a subject for the severest punishment the Court can inflict. There may also be a degree of negligence so culpable, producing a false statement, as to make it proper for us to visit the party with our displeasure. Here there certainly is an incorrectness in point of fact. And, in the first place, I do not say that the party making the return is free from blame in receiving, under what he treated as a warrant, the body of a man whom the warrant did not instruct him to receive. It is the bounden duty of a gaoler to receive no one into custody without satisfying himself that he has authority to do so. Without caution in this respect, the most dreadful consequences might occur in criminal proceedings. I think, therefore, that there is a neglect here which we cannot pass over without some degree of censure. But that is not the contempt which is now complained of. The complaint is, that the gaoler states that Watson was named in the warrant, when in fact he was not. It would not affect my view, if it should appear that the warrant is immaterial, and that Watson has not suffered by the mis-statement. In the first instance, the gaoler evidently did consider it material; and, whether it were so or not, a falsehood would constitute a contempt of the Court. But, upon the affidavits, it is impossible to impute to him the offence of wilful falsehood. Nor is there the slightest ground for imputing an intention to deceive, in any quarter. But, in some quarter or other, there has been great neglect in not comparing one document with another, so as to ensure the accuracy of that which was to come before the Court. I cannot feel that this is a matter to be passed over without blame. As to the materiality of the warrant, we gave our deliberate judgment, under a deep sense of our responsibility to the country, that that document was immaterial; and it would not be becoming in us to enter now into any argument or discussion in vindication of our views. As to the question, how far the truth of this return

(a) Sic in marg.

(b) See also stat. 5 Ann. c. 9, s. 2.

(c) See the *Canadian Prisoners' Case*, 5 M. & W. 44, note (i).

might be canvassed, I neither assent to or dissent from the propositions which have been laid down. I am not prepared to say that, if Watson had pledged his oath to the falsity of any statement of fact on the return, we might or might not make that the foundation of a proceeding to quash the return. If we could, there is no foundation for the complaint that the remedy by habeas corpus is illusory. Nor, indeed, in so singular and anomalous a case, could it be inferred, from the absence of precedent, that those who framed or have administered the law on this subject were imposing any thing like a fraud on the country, or that those provisions can therefore be said to be ineffectual, which for so long a time have bestowed upon the liberty of the subject a protection unknown in other countries. With respect to the prayer for an amendment of the return, it follows, from what I have said, that it ought to be granted; not as varying the nature of the case, for I think the return valid without the warrant; but because it is not fit or decent that a false statement should remain on the files of the Court.

LITLEDALE, J. It turns out that the statement made by the gaoler in his return is not true in point of fact. It lies upon him, then, to show that the mis-statement is owing to mistake. On the facts it does not appear that he had any intention of imposing upon the Court. The rule for an attachment should therefore be discharged. As to the other parts of the case, it is sufficient for me, after the judgment already pronounced, to say that I think the warrant not at all material. The prisoners under the Canadian Act are properly under sentence of transportation; and it would have been competent for the Governor of Upper Canada to give verbal directions to bring them to England in order that they might be sent to their destination, without a warrant. The warrant certainly does not seem to be a very business-like document; but it is not material to the question that has been brought before us; namely, whether these prisoners should or should not be remanded. It is quite fit, however, that the amendment should be made, because at present the return contains a statement which is not true.

WILLIAMS, J. It may be admitted that the observation which has been made in support of the rule is well founded; namely, that we are not to decide the question by enquiring whether Watson has been injured by what has taken place. The question is, whether or not there has been an abuse of the process of the Court, and whether the Court has been treated with contempt. Now it has hardly been seriously urged that there was a wilful attempt to deceive; and it seems to me that this really amounts to a practical abandonment of the application. I think the amendment should be made; and indeed, if the prisoner has suffered from the incorrect statement, I take for granted that his counsel will prefer that the correction should be made, so as to give him a better chance of a remedy. I quite agree that we cannot be too vigilant in insisting upon accuracy; but the question is here whether the party has been guilty of wilful disobedience and contempt. I think he has not.

COLERIDGE, J. I agree on both points. As to the first, I do not think that we have any thing now to do with the conduct of the gaoler in first receiving the prisoners: nor do I think that the materiality of the warrant can determine the question as to the attachment. The present question is, has there been a criminal and fraudulent return, and thereby a contempt of the Court? The warrant might be material, and yet

the party innocent in his purpose : it might be immaterial, and yet the party might be guilty of attempting to mislead the Court in what he considered material. Nor, for similar reasons, can the decision turn upon the question whether or not Watson has been injured by what has been done. I do not say that the gaoler is wholly free from blame ; for by greater diligence he might have avoided the inaccuracy. But the circumstances show that there is not the slightest ground for believing that he was aware of the incorrectness ; and I have therefore no hesitation in saying that the rule ought to be discharged. As to the substitution of the return filed for that originally drawn, it merely comes to this ; that the gaoler was ready to assent to any statement, consistent with what he deemed to be true, which would be a sufficient return in law. The amendment, I think, should be made, in order that what is untrue may not remain on the files of the Court. I cannot see how the prisoner can be prejudiced by that, whether the warrant be material or not ; indeed, if it be material, the amendment rather aids the prisoner. The Court has left it open to Watson to state any fact upon affidavit which would show that the amendment should not be made ; but that has not been done.

Rule discharged.

The following amendment was then made. Instead of the description of the command given to the master of the Captain Ross, (beginning with the words "by certain letters patent," ante, p. 257, and ending with the words "convenient in that behalf,") the following words were inserted :—

"The said Leonard Watson was delivered by the said sheriff of Quebec into the custody of Digby B. Morton, captain of the bark Captain Ross, for the purpose of being conveyed to England aforesaid." (a)

(a) Some of the prisoners were afterwards brought before the Court of Exchequer by *habeas corpus* ; and similar returns were filed. That Court remanded the prisoners, on the ground that, even if the conditions of pardon, and the proceedings thereupon, were illegal, the prisoners were liable to be tried for high treason in England, on the facts in the return, and ought not therefore to be discharged. *Canadian Prisoners' Case*, 5 M. & W. 32.

CASES
 ARGUED AND DETERMINED
 IN THE
COURT OF QUEEN'S BENCH,
 AND
 UPON WRITS OF ERROR FROM THAT COURT
 TO THE
 EXCHEQUER CHAMBER,
 IN
Hilary Vacation,
 IN THE
 Second Year of the Reign of Victoria. (a)

The Judges who sat in Banc in this Vacation were,

Lord DENMAN, C. J.	WILLIAMS, J.
LITLEDALE, J.	COLERIDGE, J.

The following cases, as far as *Storr v. Lee*, inclusive, are reported by *Edward Smirke*, Esquire.

JOHNSON against JONES and Another.—p. 809.

To an avowry for rent the tenant may plead payment of it to a mortgagee, to whom the premises had been mortgaged in fee before the demise to the plaintiff, and who had demanded payment from the plaintiff and threatened "to put the law in force" in case of refusal. Such plea is, in substance, a plea of payment, and not of *nil habuit in tenementis*, nor of eviction; and where the plea set out the facts at large, and concluded *et sic riens in arriere*, with a verification, held, that it was not specially demurrable on the ground that it amounted to a plea of *riens in arriere*, and should have concluded to the country.

REPLEVIN. Avowry for 14*l.*, being the balance of 40*l.* for one year's rent due at Michaelmas, 1834, in respect of premises held by plaintiff as tenant to defendant Jones.

Plea; that before the demise, and before defendant Jones had any thing in the premises, one Ann Griffith, being seised in fee of the premises, by lease and release mortgaged them in fee to J. Clement, with a proviso for reconveyance on payment of the mortgage money on a spe

(a) Under a Rule of Court made during the last term, as in Michaelmas Vacation, 1838.

it was made. The same objection was made without success in *Sapford v. Fletcher*.

WILLIAMS, J. I am of the same opinion. This is nothing like a plea of nil habuit, but is a statement of facts which show an authority in law justifying payment to a third party. In principle, therefore, it is not distinguishable from the cases relied upon in argument. It is objected, amongst the causes of special demurrer, that there is no distinct allegation to show compulsion, but only a demand and threats to enforce the law: the same objection, however, applies to the plea in *Tuyloy v. Zamira*.

COLERIDGE, J. The plea may be supported without interfering with *Alchorne v. Gomme*. Far from denying the defendant's title to grant the lease, it recognises his title throughout, and admits the money to have been rent due and in arrear to him, and proceeds to show how that rent has been satisfied. As to the form of pleading, it is the same as in the cases already cited, which are in all respects completely in point.

S.

Judgment for the plaintiff. (a)

(a) Though the plea in *Taylor v. Zamira* was objected to as amounting to *riens in arrears* (see 6 Taunt. 527,) it is observable that the demurrer was *general* both in that case and in *Sapford v. Fletcher*. On the effect of the special conclusion "*et sic*," in curing an argumentative traverse, see Com. Dig. *Pleader*, E. 30. See also *Cecil v. Harris*, Cro. Eliz. 140; *Galloway v. Susach*, 1 Salk. 284.

The QUEEN against The Inhabitants of NARBERTH NORTH.— p. 815.

A wood, consisting of oak growing from old stools, with a few ash, alder, and beech trees, had not been felled for fifty years until three years before it was rated. During the last three years the owner had annually cut the worst shoots, selling the poles by the dozen for colliery purposes and firewood, and the bark by the ton. The wood was also occasionally waste-weeded to improve the plantation. The sessions found that the wood was not saleable underwood within stat. 43 Eliz. c. 2, and the Court of Q. B. confirmed the order.

Whether woods be saleable underwoods within the statute, is a question of fact, and the Court of Q. B. will confirm the finding of the sessions upon it, unless it be evidently wrong.

At the quarter sessions for the county of Pembroke, the Court quashed a rate in which the appellant was assessed to the relief of the poor in respect of property described as "Canniston Wood," subject to the opinion of this Court on the following case.

The appellant is the owner and occupier of a wood called Canniston Wood in the parish of Narberth North, which is of the extent of 350 acres, of thereabouts. The wood consists chiefly of oak; but there are a few ash, alder, and beech trees growing therein. The oaks do not grow from acorns, or original or maiden trees, but from old oak stools belonging to trees that were last felled about the year 1786. About that year the wood was cut down by the then proprietor; and at that time they were cut from old stools. Since that period they have again sprung or grown up from the old stools or stumps; but no regular cutting of them has taken place since that time until within the last four years. Several of the trees grow from the same stool or stump. They are called poles, and are used for colliery purposes and for fire wood. The appellant during each of the last three years has cut down portions of these poles, and sold them. The mode of treating them while felling is to cut off, at the stump, the worse shoots, and leave the best and most

promising shoots to stand for further growth. These poles are sold by the dozen, and not by admeasurement, as large timber is sold. They have been occasionally waste-weeded by cutting down the crooked shoots to improve the trees that remained. Waste-weedings are permitted to lie on the ground to rot. The trees or poles cut down by the appellants had been growing for fifty years. The bark is stripped from the poles and sold by the ton; and the poles thus stripped are sold for the use of collieries by the dozen. The Court of Quarter Sessions considered that these trees were not saleable underwood within the meaning of stat. 43 Elizabeth, c. 2, and ordered the rate to be quashed.

The question for the Court was whether these trees were such saleable underwoods. If they were, then the rate was to be confirmed: if not, then to be quashed.

John Evans and *R. V. Richards*, in support of the order of sessions. *Rex v. Ferrybridge*, 1 B. & C. 386, (8 E. C. L. R.) is in point. This is neither underwood, nor saleable underwood. If it be admitted not to be timber, it does not follow that it is underwood; *Rex v. Ferrybridge*, where HOLROYD, J., says that the word is to be taken in its popular sense, in which it means coppice, as distinguished from *haut bois*. So it may be *sylvæ cædua* without being underwood, for the two terms are not synonymous; BEST, J., in *Rex v. Ferrybridge*, 1 B. & C. 388, (8 E. C. L. R.) If anything be underwood here, it is the waste-weeding only. In *Rex v. Mirfield*, 10 East, 219, the principal question was how to estimate the annual value of that which was admitted to be underwood. In *Aubrey v. Fisher*, 10 East, 446, the question was treated as one of fact, proper for the consideration of the jury; here the justices have found that the woods are not saleable underwoods within stat. 43 Eliz. c. 2; and this finding, therefore, ought to be decisive. In *Rex v. Ferrybridge*, it was considered that to make it saleable underwood the "main object" of planting must be the "prospect of deriving a profit by sale." Here only the worse shoots are cut off, and the better left. The trees have been left to grow for fifty years; there has been no regular time for cutting; the cutting indeed has been nothing more than the ordinary practice of thinning a plantation for the purpose of improving it. Whether the wood be titheable, or not, is immaterial.

E. V. Williams, contra. The appellant is liable as the occupier of underwood of a renewable nature, and which, under proper management, is capable of yielding a succession of profits. Trees or timber are not generally rateable as such, because they yield no such annual or successive profits; but here a profit is made by cutting the shoots produced by the stools. The wood having been cut fifty years ago, this is the second growth of germins. Suppose the appellant had been rated just after the woods had been then felled, could he have objected to the rate? He could not have then said that he intended to take no further profit from them; for stat. 35 Hen. 8, c. 17, prohibits the conversion of such woods as Canniston Wood into tillage. In *Rex v. Ferrybridge*, 1 B. & C. 386, it was impossible to treat fir and larch as underwood; for, when felled, they yield no new shoots. Oak may be underwood, as well as other wood, for the terms *haut bois* and *sous-bois* (which originally were terms of woodcraft) apply as well to timber as other trees; Com. Dig. *Chase*, (N.) The old authorities distinguish timber by the name of *maresme*. Lord HARDWICKE, in *Walton v. Tryon*, 2

Gwill. 832, observes that "great part of the coppices or underwoods of the kingdom are germins from the stools of timber wood;" and in *Evans v. Rowe*, M'Cl. & Y. 577, it was held that wood, yielded by such germins and springing from old oak stools, was titheable, not as gros bois or timber trees, but as *sylva cædua*.

LITLEDALE, J.(a) The first question is, whether this wood is underwood? Small wood, never likely to be used for timber, may be called underwood; so may plantations of timber trees, not intended for permanent growth, but to be cut at stated intervals for use as hop poles, or for other similar purposes. Here the poles were never meant for growth as timber, and may therefore be properly called underwood. Then are they *saleable* underwoods? A capacity of being sold for profit belongs to all wood; the statute must therefore be taken to mean underwoods cut down for sale at regular and calculable periods. The question therefore becomes one of fact, which the justices at sessions must decide, taking into consideration the mode of managing that sort of property, the time of cutting, and other circumstances. In *Aubrey v. Fisher*, 10 East, 446, the opinion of the jury was taken on the question. Here, that of the justices has been given; and their decision, not being evidently wrong, should be conclusive.

WILLIAMS, J. The statute, by expressly mentioning underwoods, virtually exempts timber trees. The same rule of construction has been considered to exclude all mines except those specified in the act.(b) The nature of the tree does not determine the question, which is one of fact depending upon the treatment of the woods in each case. The law has laid down no precise rule, nor are the sessions bound by any; I cannot therefore say that they were wrong.

COLERIDGE, J. I am of the same opinion, though I have not arrived at it without difficulty. If the point were *res integra*, I should be inclined to say that this was saleable underwood within the meaning of the statute. I am not satisfied with the definitions of saleable underwood which are to be found in the cases cited; nor can I think that the object and purpose of the plantation should be taken as the tests. The rule, as stated by Mr. *Williams*, appears to me to be a reasonable one; viz. that, if the underwoods are in their nature renewable, and capable, under proper management, of yielding a succession of profits at stated intervals of time, they are rateable. The fraud or neglect of the owner should not be made a ground of exemption. Here, however, the sessions have not found any fraud or neglect; and the woods must therefore be taken to have been managed in the usual and regular course. If so, there was here no regular or calculable succession of profits. The cuttings do not appear to have been with a view to profit. The waste weeding is merely to promote the growth of the trees; and the worst shoots only are cut for fuel and colliery purposes. Perhaps the sessions may have formed a wrong opinion upon the facts: but they best know the custom and practice of their own neighbourhood; and, unless their opinion appears to us to be clearly wrong, we should uphold it.

S.

Order of sessions confirmed.

(a) Lord Denman, C. J., was absent.

(b) See dict. Lord Tenterden, C. J., in *Rez v. Sedgely*, 2 B. & Ad. 78, (22 E. C. L. R.)

The QUEEN against BUSH.—p. 820.

Where a parish consists of several tithings, each of which has immemorially repaired its own highways, the parish cannot form a board under sect. 18 of 5 & 6 W. 4, c. 50, (Highway Act); and rates made by such board, although separately for each titthing, are bad.

At the Wilts Epiphany sessions in 1838, John Bush appealed against a rate made for the repair of the highways in the borough of Bradford in the said county. The sessions confirmed the rate, subject to the opinion of this Court on the following case.

The parish of Bradford is a parish consisting of eight several tithings. There are not separate overseers for each of the several tithings; nor do the tithings separately maintain their own poor: but there are four overseers annually appointed from some of the tithings for the whole parish; and there is one entire rate on all the tithings for the general maintenance of the poor of the whole parish. It has been the general custom in the parish to appoint surveyors of the highways from each titthing in the parish separately, and to raise a rate in each separate titthing for the repairs of the highways within the titthing, which has been applied to the repairs of the roads within the titthing in which the rate is raised; and there has been no general rate for the repairs of the highways in the whole parish conjointly. The practice of appointing separate surveyors of each distinct titthing in the parish, and of separately rating the inhabitants of the tithings to the repair of the highways within the tithings only, continued until the vestry meeting for the nomination of overseers of the parish held on 31st March, 1836, when stat. 5 & 6 W. 4, c. 50, (Highway Act), had come into operation, at which meeting it was unanimously resolved, "That it was expedient to form a board for the superintendence of the highways of the parish, and for the purpose of carrying into effect the provisions of 5 & 6 W. 4, c. 50," and thirteen persons, (some one or more being selected from each of the eight tithings,) were then duly elected to serve the office of surveyors of the highways for the year ensuing, and to compose such board. The board, so appointed, managed the repairs of the highways until the next annual appointment of overseers, and appointed a clerk and a general surveyor, but made separate rates for each titthing in the parish, and applied the moneys raised in each titthing for the repairs of the highways within such titthing, and not to the general repairs of all the highways in the parish. At the annual meeting for the nomination of overseers for the ensuing year, on 31st March, 1837, a board was again formed, in pursuance of 5 & 6 W. 4, c. 50, for the superintendence of the highways of the parish, and for the purpose of carrying into effect the provisions of the said act; and four surveyors for the borough and a surveyor for each titthing constituted the board. The board of surveyors, so formed, continued the clerk and general surveyor as in the preceding year, and made a separate rate for the borough titthing of Bradford, which was the subject of the appeal. The appellant contended that, since the act 5 & 6 W. 4, c. 50, came into operation, and since the passing of the resolutions of vestry on the 31st of March, 1836, the rate ought to be a general rate for the whole parish, and not a separate rate for each titthing, and that therefore the separate rate for the borough titthing ought to be quashed. The sessions found that the parish of Bradford consists of eight tithings: that from time immemo-

rial the tithings have been severally and separately assessed for the maintenance of the highways within such tithings respectively, and have had separate surveyors for such tithings respectively, down to the 31st of March, 1836; that such immemorial custom was a legal custom; that, notwithstanding the act 5 & 6 W. 4, c. 50, or anything done by the inhabitants of the said parish of Bradford from 31st of March, 1836, the said custom of separately rating was a lawful and subsisting custom down to the time of the appeal.

The questions for the opinion of the Court were, first, Whether such custom, as found by the sessions, was valid in law: and, secondly, Whether, the inhabitants of the borough tithing and the several tithings above mentioned having united in forming a board pursuant to 5 & 6 W. 4, c. 50, there should now be a separate rate for each tithing, or one rate for the whole parish.

Bingham, in support of the order of sessions. The custom found by the sessions is a valid one. [This was admitted by *Follett*, contra.] Then the tithings must be separately rated, notwithstanding stat. 5 & 6 W. 4, c. 50, which contains no provision to alter the mode of rating. The 16th section shows the intention of the legislature in an analogous case; for it provides that, where several parishes are united into a district, the moneys levied in each parish shall be applied by the district surveyor for its own benefit. It will be objected that a board cannot legally be formed for the general purposes of the parish. But, supposing the objection to be open on this case, the appointment of the board is at all events good, if not under sect. 18, at least under sect. 6, the rates having been made separately for each tithing.

Sir *W. W. Follett*, contra. The act makes no difference in the liability to repair; but the rate is not made by the proper party. Sect. 6 authorizes the appointment of surveyors by the parish. By the interpretation clause, (sect. 5,) "parish" may mean "a tithing" maintaining its own highways. Therefore each tithing should appoint its own surveyor, who should make the rate. If the tithing be sufficiently populous to justify the appointment of a board, then it may avail itself of the provisions of sect. 18; but there can be no board for the whole parish with power to rate each tithing. If, indeed, the board, by which the rate on the borough tithing was made, had happened to consist of the surveyors of that tithing, and they had signed the rate, there might have been some ground for supporting it; but that does not appear. It is clear that the inhabitants of the parish intended to appoint a parish board under sect. 18, which could not be done, if the custom was a legal one.

Per Curiam.(a) The second question assumes the legality of the board, which is not legal. The order must be quashed.

S.

Order of sessions quashed.

(a) *Littledale, Williams, and Coleridge, Ja.*

The QUEEN against The Inhabitants of the Township of BISHOPTON.—p. 824.

Pauper, whose children were engaged to work for three years at a mill, removed with his family to a cottage rented by the millowner, C., for the convenience of families so employed. The bargain between him and C. was, that a stated weekly payment for the use of the cottage should be deducted from the children's wages. Pauper, who was not himself in the service of C., continued to occupy the cottage for sixteen years, during all which time, and after he quitted it, some one or more of his children continued to work at the mill. He quitted without regular notice, in consequence of the sale of the cottage.

Held, that pauper's occupation was as tenant, and not as servant, and was sufficient to gain a settlement.

ON appeal against an order of two justices for the removal of George Winterburn and Ann his wife from the township of Ripon, in the liberty of Ripon in the West Riding of the county of York, to the township of Bishopton, in the said liberty, the sessions confirmed the order, subject to the opinion of this Court on the following case.

Prior to the year 1813, the pauper George Winterburn, his wife, and nine children, resided at Bishop Thornton, in the county of York, and some of his children worked in a mill there. In that year he removed with his family into a cottage at Bishopton, situated within one eighth of a mile from a flax-mill belonging to one Mrs. Coates. This cottage, and two others adjoining it, were rented by Mrs. Coates from a Mr. Swinden, for the convenience of the families employed at her mill, some of the children of each family living in these cottages being so employed. The pauper had six children, who worked at the mill, and who were engaged for three years. The pauper made the bargain with Mrs. Coates's manager, since dead; which was, that 2s. per week was to be paid for the use of the cottage, and to be deducted from the children's wages. The children continued to work for the three years originally contracted for, and some of them for a longer period. The pauper continued to occupy the cottage until the year 1829; at which time one of his sons, being then twenty-four years of age, still worked there, and continued to do so after the pauper had left the cottage and removed to Ripon. During the time he occupied the cottage, the pauper worked as a husbandman for various persons, and occasionally for Mrs. Coates, but never was her servant. In 1829 the three cottages were sold by Swinden to a third party; and the usual notice was given to Mrs. Coates to deliver up possession thereof to the purchaser. The pauper in consequence was required to move; which he accordingly did after a few weeks, without having received any regular notice to quit. During his occupation of this cottage, the pauper rented other tenements within the township of Bishopton of a sufficient value, if added to the cottage, to confer a settlement in that township. The question for the Court was, whether under the foregoing circumstances the occupation of the cottage by George Winterburn was such a renting of a tenement as to aid in conferring a settlement within the meaning of stat. 13 & 14 Car. 2, c. 12.

Talbot and J. Ingham, in support of the order of sessions. The question is, whether the pauper's occupation was independent of service, or ancillary to it. Here was, in fact, no continuing relation of master and servant; for it was not the service of the pauper, but of his children, that was contemplated. The pauper would have continued to

occupy although the mill had been burnt down; and in fact he did continue in possession long after the engagement of his children had expired. His settlement by occupation cannot be avoided by showing that some members of his family were in the service of his landlord. *Regina v. Wall Lynn*, 8 A. & E. 379, (35 E. C. L. R.,) is a stronger case than the present; for there the master paid the rent, rates, and taxes, yet the servant was held to be the rateable occupier and tenant. In *Rex v. Field*, 5 T. R. 587, the appellant merely occupied a room in the house of the employer. In *Rex v. Cheshunt*, 1 B. & Ald. 473, the occupation was connected with the service and ceased upon dismissal. *Rex v. Minster*, 3 M. & S. 276, (30 E. C. L. R.,) *Rex v. Lower Heyford*, 1 B. & Ad. 75, (20 E. C. L. R.,) *Rex v. Cherry Willingham*, 1 B. & C. 626, (8 E. C. L. R.,) *Rex v. Iken*, 2 A. & E. 147, (29 E. C. L. R.,) are all in favour of the settlement. *Rex v. Fillongley*, 1 T. R. 458, shows that a tenancy of the slightest kind is sufficient. The sessions have in fact decided the question by stating that the pauper never was the servant of Mrs. Coates.

Dundas, contra. The occupation was merely ancillary to the service of the children. Every factory is surrounded by cottages occupied on similar terms. It is as if a gentleman had permitted his coachman to bring all his family to live with him on the premises of the master, because his sons would be useful as stable-boys. If the father had died, the children would have continued to occupy; and if the children had died, the father would have been turned out. The real inquiry always is, what was the principal object in letting the party into possession? In *Regina v. Wall Lynn* the pauper had been always rated and treated as tenant, which is not found to be the case here. *Rex v. Seacroft*, 2 M. & S. 472, (28 E. C. L. R.,) and *Rex v. Kelstern*, 5 M. & S. 136, are in point. *Rex v. Cheshunt* very nearly resembles the present case. In *Rex v. Minster* the tenement was the feeding of cows, and was of course quite unconnected with service. So in *Rex v. St. Mary Newington*, 5 B. & Ad. 540, (7 E. C. L. R.,) the occupation as curate was held to be an interest independent of that of the rector.

LITLEDALE, J.(a) I think the pauper gained a settlement in Bishop-ton. In the cases cited the other way there was the relation of master and servant between the owner of the tenement and the occupier. Here the pauper engages for the service of his children, and arranges with Mrs. Coates for the residence of himself and his family in the cottage. This is clearly a renting of the cottage by him. The renting was indeed connected with the service of the children; for the cottage would probably not have been let to the pauper, or hired by him, but for the service of the children; but he agrees to pay rent for it. This imports the relation of landlord and tenant, and there is nothing in the case to rebut the presumption.

WILLIAMS, J. In the cases referred to, in which the occupation has been held insufficient, the residence was identical with the service, or was incidental to and inseparable from it. Here there was a renting by one who was not servant; and the deduction from the wages of his children was only a mode of paying the rent.

COLERIDGE, J. The sessions should have decided this point as a matter of fact. I agree with Mr. *Dundas*, that the principal question is the object of the parties, and that, if the occupation was ancillary to the service, so as to make the occupation of the servant merely the

occupation of the master, then no settlement was gained. The pauper here seems to have thought he had a right to dispose of his children's labour, and to pay his rent out of their wages. Upon the whole, I agree with the rest of the Court.

S.

Order of sessions confirmed.

The QUEEN against The Company of Proprietors of the BLACK-FRIARS' Bridge.—p. 828.

A company, incorporated by stat. (57 G. 3, c. lviii.) for rebuilding a public bridge, was enabled to raise a capital stock by shares, with the usual powers of mortgaging tolls, &c. The dividends were limited to $7\frac{1}{2}$ per cent. on the shares; and the excess was to be applied to paying off the subscribed capital, and to raising a fund for discharging mortgage debts, &c., and repairing the bridge; after which the tolls were to cease. The tolls were in fact absorbed by the payment of interest to mortgagees, the liquidation of debts, and the expense of repairs, leaving nothing for the payment of any interest or dividend to the shareholders. Held, that the company was rateable to the relief of the poor in respect of the bridge and the land occupied by it.

ON appeal against a rate for the relief of the poor of the township of Salford, in Lancashire, in which the Company of Proprietors of Blackfriars' Bridge was rated for a moiety of Blackfriars' Bridge, and the abutments thereof and land occupied by the same, the sessions confirmed the rate, subject to the opinion of this Court on the following case.

By an act passed in 1817 (a) for building a bridge across the river Irwell from Water Street in the township of Salford to St. Mary's Gate in the township of Manchester, and for making proper avenues thereto, (which act was to form part of the case,) reciting that the then wooden bridge, called Blackfriars' Bridge, was extremely inconvenient, and that it would be of great utility, not only to the inhabitants of the said townships but to the public, if the said bridge were taken down and another erected in lieu thereof, for the passage of horses and carriages as well as foot passengers, certain persons were incorporated by the name of "The Company of Proprietors of the Blackfriars' Bridge," and were empowered to raise and contribute amongst themselves any sum or sums of money not exceeding in the whole the sum of 17,700*l.*, to be divided into shares of 50*l.* each, which said sum it was thereby declared should be laid out and applied in the first place in discharging the expenses of obtaining and passing that act, and of the surveys, plans, estimates, and other incidental expenses relating thereto, and then for and towards the making and completing the said bridge, and paying the purchase-money for the messuages, lands, and hereditaments thereby authorized to be purchased, and otherwise for putting the said act into execution. It was further enacted that, if the said sum should be found insufficient for the building and completing the bridge and the avenues thereto, and all necessary charges and expenses relating thereto, &c., then the company might raise the further sum of 12,000*l.*, either by fresh contributions or subscriptions, or by way of mortgage of the bridge, and the tolls, pontage, and duties thereof, &c. And it was also provided that the interest of the moneys borrowed on mortgage should be paid half yearly, in preference to any dividends and distribution to the proprietors, and should be duly provided for and set

(a) Stat. 57 G. 3, c. lviii. (local and personal, public).

apart before such dividend or distribution should be made or declared, but that the mortgagees should not be deemed proprietors of any shares. The company were empowered to set up turnpike gates or toll gates, and take certain tolls in the act specified, which were to be applied in the first place in discharging the expenses of obtaining the act, and, from time to time, of carrying the same into execution and of keeping the bridge in repair; and, in the next place, in paying interest to the mortgagees, the surplus thereof to be divided amongst the proprietors in proportion to the amount of their respective shares in manner following, that is to say, that they should be entitled to receive, out of the tolls, interest after the rate of 5 per cent. per annum upon the money paid from time to time upon their respective shares, which interest should commence from the time or times of payment thereof; and from and after the time when the said bridge should be opened, the proprietors should, instead of such interest, be entitled to receive interest and dividends upon their respective shares out of the tolls, so as that such proprietors did not receive more than 7*l.* 10*s.* per cent. per annum upon the amount of such shares; and, when such surplus should be more than sufficient to pay such interest and dividend of 7*l.* 10*s.* per cent. per annum, the excess should, from time to time, be applied rateably in the payment and discharge of the principal sums advanced by the proprietors in pursuance of the act, who should then only be entitled to receive interest and dividends as aforesaid upon the residue; and so until the whole amount of the said capital stock of 17,700*l.* should have been paid off; and from thenceforth the proprietors should cease to receive any further share of the said tolls or any payment in respect thereof, except as thereafter mentioned; and the tolls should, after the payment of such expenses and interest to the mortgagees, thenceforth, from time to time, be laid out in the name of the company in the purchase of Bank stock, to accumulate in the nature of compound interest until sufficient for paying off the mortgages, &c., and raising a fund for repairing the bridge; after which, tolls and duties should wholly cease.

In pursuance of the powers of the act, the company purchased land for making the bridge, and subscribed among themselves the sum of 17,700*l.*, and borrowed on mortgage the further sum of 12,000*l.* These sums were not sufficient for building and completing the bridge, and the other charges and expenses which the company were empowered to defray; and they incurred a further debt in the completion of the undertaking, the balance of which debt, viz., 3225*l.*, still remained unpaid. The bridge was opened to the public about the year 1822.

The tolls hitherto received by the company have been by them applied, after defraying the necessary expenses of keeping the bridge in repair, &c., in keeping down the interest of the mortgages and in the liquidation of the above debt, and in payment from time to time of the interest due upon the unliquidated portions of such further debt; no surplus has hitherto existed for a dividend, and none has been declared; and the company have not yet received any dividend or interest upon the subscribed sum of 17,700*l.* or any part thereof. The tolls are let in the current year for 1500*l.*, and were let in the preceding year for 1180*l.*

The question for the opinion of the Court was, whether the company of proprietors were liable to be rated under the circumstances, and with reference to the above enactment.

Bere and Martin, in support of the order of sessions. The appellants obtained the act of parliament for their own, as well as for the public, benefit; and they have a beneficial interest in the tolls. That the undertaking has not yet been a profitable one is immaterial; *Rez v. Parrot*, 5 T. R. 593, *Governors of the Bristol Poor v. Wait*, 5 A. & E. 1, (31 E. C. L. R.,) *Rez v. St. Giles, York*, 3 B. & Ad. 573, (23 E. C. L. R.) The true test is the applicability of the profits, if any, to private advantage. Perhaps, too, the interest paid to the mortgagees may here be considered as profit. [LITTLEDALE, J. The interest so paid is not profit.] That the dividend is limited to $7\frac{1}{2}$ per cent. makes no difference: such limitation is now very general in the case of numerous private speculations founded on acts of parliament, as railways, &c. That the bridge may, at a future time, be thrown open for the free use of the public, does not affect the present liability of the company. If there could, by no possibility, be any beneficial interest accruing to individuals from the tolls, then the case might be within *Rez v. Liverpool*, 7 B. & C. 61, (14 E. C. L. R.,) *Rez v. The Trustees of the River Weaver Navigation*, 7 B. & C. 70, (u.), and *Rez v. Beverley*, 6 A. & E. 645, (33 E. C. L. R.)

Peel and Walker, contra. The principle is not in dispute; but, first, the property is not rateable at all; and, secondly, at all events, it is not rateable at present. The recital in the act shows that the public benefit alone was in the view of the legislature. The contributors are only the creditors of the corporate body, which itself can derive no profit. They are on the footing of mortgagees, with the power, in a certain and distant event, of taking interest at the rate of $7\frac{1}{2}$ per cent. It makes no difference that the corporation borrows money from its own members as well as from strangers. It is no more than if, in the case of the *Liverpool Docks* or the *Weaver Navigation*, parliament had relaxed the usury laws, and permitted the trustees to borrow money at a higher rate of interest in order to facilitate loans; yet it is plain that such a provision could not have varied the decision in those cases. That the shareholders are regarded by the act as mere encumbrancers, appears from the provisions for paying them off, and for giving a preference to their claim for interest. Railroad companies differ in this respect, that no ultimate cessation of interest is ever contemplated by them; here, the ultimate destination is for public use alone. The late case of *Regina v. Mayor &c., of Liverpool*, ante, p. 435, shows that some benefit may be received by individuals, as salaries, without making the property rateable. [LITTLEDALE, J. There the salary was only given for duty done. No man, as corporator, could ever derive any private pecuniary advantage from the corporate fund.] All the tolls might lawfully have been applied (a) towards completing the work: here the company have in effect done so; for they have completed the work and pledged the tolls as security for the repayment of the money advanced for that purpose. The company are therefore in the state contemplated by HOLROYD, J., in *Rez v. The Hull Dock Company*, 5 M. & S. 402, where, speaking of repairs, he says, "If the specific rates had been, so far as they were required, appropriated to that purpose only, I should have entertained considerable doubt whether any property vested in the trustees, which

(a) The judgment of Lord Abinger, C. B., was cited for this point from the report of *Thickness v. Lancaster Canal Company* in 8 Law Journ. N. S. Exch. 49. See S. C. 4 M. & W. 472.

could properly be made the subject of a rate beyond the surplus which might happen to remain in their hands after satisfying the expenses attending the maintenance and repair of the works." At all events, the property is not rateable till it is productive. It is true that a losing speculation may be the subject of rate; but here, not only is no private profit derived from it, but the concern itself yields no profit. It cannot possibly be productive for many years. At present, the company has received neither interest nor dividend on the subscribed shares. *Rex v. Mirfield*, 10 East, 219, and *Rex v. Narberth North*, ante, p. 815, show that there must be a calculable succession of profits before a rate can be imposed.

LITTLEDALE, J.(a) The case is not distinguishable from that of a private person, who builds a bridge on his land for the public benefit, and, in order to reimburse himself the expense of the work, procures an act of parliament to enable him to take toll for that purpose: there land would be occupied, and, so long as the toll was taken, beneficially occupied; and, after the party was reimbursed, the toll would cease and the bridge become public and free: yet the land would no doubt be rateable so long as the toll was received; and it would be no answer that the owner was only repaying himself, or receiving interest on his outlay. In the present case, the proprietors are further entitled to 2½ per cent. beyond the usual interest. It is immaterial that the expense of maintenance and the interest upon debts, for the present, absorb the profits, or that there is provision for the total cessation of toll hereafter: when the latter event takes place, of course the liability to be rated will also cease. In the case of the *Liverpool Corporation*, ante, p. 435, the fund was entirely appropriated to public purposes, and no private profit could be reaped from it.

WILLIAMS, J. The application of the profits in this case distinguishes it from those in which it has been held that public property is exempt from rates. In *Rex v. The Commissioners of Salter's Land Sluice*, 4 T. R. 730, which is the foundation of the later cases, it appeared that the profits could never be appropriated to any but strictly public purposes. The same observation applies to the other cases of exemption cited in argument.

COLERIDGE, J. This is a clear case of property which yields a profit. If there is a beneficial occupier entitled to the profits, he is rateable. The tolls are partially applicable to private purposes; and the occupation is consequently beneficial.

S.

Order of sessions confirmed.

(a) Lord Denman, C. J., was absent.

The QUEEN against The Inhabitants of OUTWELL.—p. 836.

Under sect. 79 of stat. 4 & 5 W. 4, c. 76, copies of all the examinations touching the settlement of a pauper, taken by the justices upon making an order of removal, must be sent with the copy of the order; and the omission of any one examination is ground of appeal, although it may not contain the evidence upon which the order was in fact founded.

ON appeal against an order for the removal of Penelope Bott and her eight children, from the parish of Outwell to the hamlet of March, the

sessions for the county of Norfolk quashed the order, subject to the following case.

The removing magistrates took the examination of Penelope Bott, John Bott, the father of the pauper's husband, and Charles Smith, which stated a settlement gained by the pauper's husband by apprenticeship in the appellant parish. Before making the order, they also took the examination of one William Clarke, which referred to the hiring of some land by the pauper's husband in the respondent parish: but the magistrates made the order of removal upon the examination of the said Penelope Bott, John Bott, and Charles Smith only; and those were the examinations sent with a duplicate order of removal to the appellant parish. The land as to which William Clarke was examined was the same tenement by the hiring of which the court adjudged the pauper to have gained a settlement in the respondent parish. The notice of the grounds of appeal was as follows:—1. Because the person, who acted as overseer in obtaining the said order, was not duly appointed. 2. Because copies of all the examinations touching the settlement of the said paupers, taken by the said justices previous to signing the order, were not sent with the counterpart thereof. 3. Because the paupers were settled in the parish of Outwell.

It was contended, on the part of the respondents, that, as the notice of appeal did not deny the settlement stated in the examinations of Penelope Bott, John Bott, and Charles Smith, it must be taken to be admitted, and any evidence of that settlement was unnecessary; and the Court were of that opinion. It was then objected, by the appellants, that the examination of William Clarke ought to have been sent with the duplicate order of removal to the appellant parish; but the objection was overruled by the Court. The appellants then proposed to give evidence of a settlement in the respondent parish by renting a tenement. The respondents objected that the terms of the notice of appeal were too general, and that such evidence could not be given. The Court, however, received the evidence and quashed the order. The following were the questions submitted to the opinion of this Court.

1. Whether the examination of William Clarke ought to have been sent with the order of removal. 2. Whether, under the terms of the notice of appeal, evidence of the settlement in Outwell could be given.(a)

Bere and Byles, in support of the order of sessions. Stat. 4 & 5 W. 4, c. 76, s. 79, provides that no pauper shall be removed or removable until twenty-one days after a notice in writing of his being chargeable, accompanied by a copy or counterpart of the order of removal, and "a copy of the examination upon which such order was made, shall have been sent," &c. In *Regina v. Brizham*, 8 A. & E. 375, (35 E. C. L. R.,) it was held that non-compliance with these requisitions is ground of appeal. Here all the examinations ought to have been sent, and not those only which induced the justices to remove the pauper. No discretion is left in this respect to the removing justices. The examination withheld may have supplied the appellants, if not with the means of resisting the removal, at least with some proof of a settlement elsewhere. Here it rather seems that the suppressed examination tended to show a settlement in Outwell.

(a) The first point was relied upon in support of the order of sessions, because the ruling of the sessions on the latter was considered by counsel to be at variance with *Rea v. The Justices of Derbyshire*, 6 A. & E. 885, (33 E. C. L. R.)

Manning and Palmer, contra. The word "examination," in the singular number, is used in both sect. 79 and sect. 81. The latter section prevents the respondent parish from showing any ground of removal, except the one which appears on such examination. This shows the object of the provision which requires it to be sent, and is a sufficient check upon any improper suppression. To require all the evidence, whether material or not, to be sent, will occasion expense, and expose the removing parish to the risk of paying costs under sect. 83, for setting out frivolous grounds of removal. The statute does not require any examination to be sent but that "upon which the order was made." Here it is expressly found that the order was not made on Clarke's examination.

LITLEDALE, J.(a) The entire evidence, upon the examination, ought to be sent. It is true the order may have been made solely upon the testimony of the three persons whose examinations were forwarded; but that of Clarke, as it appears to have related to the subject of the settlement, ought to have been also sent.

WILLIAMS, J. I have entertained some doubt; but, on the whole, it will be better to hold that all the examinations should be sent. A different decision may perhaps lead to mischief. It appears that the examination of Clarke related to the hiring of land in the respondent parish, and may have been material.

COLERIDGE, J. I am clearly of opinion that the examination of Clarke should have been sent. The provisions of the statute in this respect have proved very beneficial, and ought to be supported in their fullest extent. The word "examination" means the entire body of evidence taken on the occasion of making the order, the whole of which should be sent, that the parish, which is ordered to receive the pauper, may have an opportunity of considering whether that order should be resisted or submitted to. Any other construction would put parties to the inconvenience of inquiring how far the different examinations had been acted upon in making the order. Bad faith on the part of the parish officers, whose duty it is to send the examination, might lead them to suppress the evidence that was unfavourable to them, and to forward only the rest. The word "examination" may be treated as *nomen collectivum*. Arguments have been drawn from sections 81 and 83, which are said to point to a narrower construction; but, if the object of the legislature had been merely to confine the removing parish, on the trial of an appeal, to the grounds contained in the examination, why not simply provide that notice of the ground of removal should alone be sent? As to sect. 83, it provides only against frivolous grounds contained in the *order*, not in the *examination*. Upon the whole, expense is more likely to be prevented by a candid statement of the whole of the evidence, than by forwarding an *ex parte* statement, on which no reliance will be placed.

S.

Order of sessions confirmed.

(a) Lord Denman, C. J., was absent.

BRUNSKILL against ROBERTSON, Esquire.—p. 840.

Declaration against a sheriff for taking insufficient bail, &c., alleged a capias against Frederick S. by the name of William S., and an arrest under it by defendant, and that Frederick S. was known as well by the name of William, as Frederick, whereof defendant had notice; and that, before the debt accrued, he had often admitted to plaintiff that he was known by the name of William, whereof defendant had notice at the time of the arrest. Plea, that, at the time of arrest, Frederick S. was not known, nor had defendant notice that he was known, as well by the name of William as Frederick; and that defendant arrested Frederick S. on the false information of plaintiff's agent, that he was the William S. described in the writ; and that Frederick, being so arrested, did not admit himself to be William S., &c. Verification.

Held, that the averment, in the declaration, of the frequent admissions by Frederick S. was superfluous, and mere matter of evidence; that so much of the plea as denied that Frederick S. was known as well by one name as the other, and that defendant had notice thereof, was a complete answer, and ought to have concluded to the country; and that the rest of it was immaterial and redundant, and ground of special demurrer; but that the plea was good on general demurrer.

Quære, Whether the use of a wrong name, on a single occasion, by the party arrested, will support an allegation that he was known by that name?

CASE. The declaration stated that one Frederick Studdy (who was known as well by the name of William as Frederick, whereof defendant had notice, and who had, before the accruing of the debt to plaintiff thereafter mentioned, often admitted to plaintiff that he was known by the name of William, whereof defendant had notice at the time of the arrest) was indebted to plaintiff in the sum of 77*l*. in respect of certain causes of action; that plaintiff, for the recovery of the said debt, sued out a writ of capias against the said Frederick by the name of William Studdy, directing the sheriff of Devon to take William S. (meaning the said Frederick S., who was then as aforesaid known as well by the name of William as Frederick;) that the said writ was duly indorsed for bail, and delivered to defendant, then being the sheriff of Devon; that defendant arrested the said Frederick by virtue of the said writ, and detained him in custody, as such sheriff, at the suit of plaintiff; that, the said Frederick being so arrested and in custody, defendant, as such sheriff, took bail for his appearance, and took a void bail bond from the said Frederick and one Albert S., being the brother of the said Frederick, and, as defendant then well knew, a minor under the age of twenty-one, the said Albert being the sole surety of the said Frederick. Yet defendant, not regarding his duty, &c., took the said bail bond as a bail bond good and binding in law, and treated the same as being good and binding; and thereupon afterwards, without the knowledge or consent of plaintiff, voluntarily suffered the said Frederick to escape out of his custody, the debt for which he was so arrested being still unpaid: that no deposit was made, nor special bail put in, by the said Frederick; and that defendant afterwards falsely returned upon the said writ that the said William (the said Frederick being, as defendant well knew, then known as well by the name of William as Frederick) was not found in his bailiwick, by means whereof, &c. Plea: that at the time of the arrest the said Frederick was not known, nor had defendant notice that the said Frederick was known, as well by the name of William as Frederick; and that defendant arrested the said Frederick on the false information of plaintiff's agent in that behalf, that the said Frederick was the William Studdy described in the writ; and that the said Frederick, being so arrested, did not admit himself to be William Studdy, as in the declaration mentioned, but refused so to do, and executed the bail bond in his true name of Frederick:

verification. Replication: that, after making the arrest, and before taking the bail bond, and while the said Frederick was in defendant's custody, defendant appealed to the said Frederick, and demanded of him to say whether he was not the person indebted to the plaintiff in the sum for which the said writ was issued, and the person meant by the plaintiff under the name of William in the said writ; that the said Frederick thereupon, and before taking the bond, assented thereto, and admitted to defendant that he was such person, and then promised and assured defendant that he would discharge the debt and costs, and save harmless the defendant; and thereupon defendant took the said bail bond and discharged the said Frederick: verification. Rejoinder: that the said Frederick did not admit that he was the William described in the writ; but, on the contrary, as soon as he knew that the person against whom the writ issued was therein described by the name of William, asserted, as the fact was, that he was named Frederick, and had never been called or known by the name of William, and disputed the validity of the arrest, and executed the bail bond in his true name of Frederick: verification. Surrejoinder: that the said Frederick, from the time of the arrest until his discharge, continually admitted he was such person as in the replication is mentioned: conclusion to the country.

Demurrer, alleging for special cause that the surrejoinder takes issue on no fact alleged in the rejoinder; and, if it contains a confession and avoidance, ought to conclude with a verification.

W. H. Watson, for the defendant. The material question on the record is, whether Studdy was known as well by the name of William as by that of Frederick; whereas the allegations of the plaintiff, subsequent to the plea, only show that he was the person meant to be arrested. *Cole v. Hindson*, 6 T. R. 234; *Shadgett v. Clipson*, 8 East, 328; *Scen-dover v. Warne*, 2 Camp. 270; *Finch v. Cocken*, 2 C. M. & R. 196, are in point. If an officer were killed by the party misnamed, in the attempt to execute process under such circumstances, it would only be manslaughter; Foster, 2 Disc. on Homicide, p. 312, (2d ed.) Even where the party arrested by a wrong name has estopped himself, by some previous representation, from taking advantage of the misnomer, the sheriff is not bound to arrest or to detain, though he will be justified in doing so, and if he releases the party so arrested, no action lies for the escape; *Morgans v. Bridges*, 1 B. & Ald. 647. The rule Hil. 2 W. 4. s. 32, Jervis's New Rules, p. 67, (4th ed.) does not alter the law; it only provides that, where due diligence has been used to find out the real name, the party arrested by a wrong one shall not be discharged upon motion. This is for the benefit of the plaintiff in the suit, but will not legalise the arrest. As to the allegation respecting the bail bond, it is quite immaterial if the sheriff was not bound to arrest at all: and, as to the surrejoinder, it traverses no material statement in the rejoinder.

Erle, for the plaintiff. The arrest by the defendant was legal and valid; and, if he was justified in arresting, and elected to do so, he is now liable for the escape. Studdy, having admitted himself to be the person named in the writ, was estopped from taking advantage of the misnomer. Such an admission upon a single occasion would not support the plaintiff's averment that the party was known as well by one name as the other; HOLROYD, J., in *Morgans v. Bridges*, 1 B. & Ald. 652, (a) but it would operate as an estoppel; *Newton v. Maxwell*, 2 C. & J. 215; *Price v. Harwood*, 3 Camp. 108. The latter case shows that an admission, made at the time of arrest, precludes the party arrested

(a) See also *Mestaer v. Hertz*, 3 M. & S. 453.

from availing himself of a misnomer. When he has once omitted to take advantage of the misnomer, the wrong name becomes the real one throughout the suit; *Crawford v. Sutchwell*, 2 Stra. 1218. Here the defendant is stated in the declaration to have had notice of frequent admissions by Studdy that he was known by both names; and this is not denied by the defendant in his plea. The declaration and plea together contain all the material facts; the rest of the pleading is irrelevant and immaterial. The allegation in the declaration that Studdy had often admitted he was known by the name of William, and that the defendant knew of this, is alone enough to support the action for the escape; for the arrest was lawful under that state of things; and, although a sheriff may not be bound to arrest, yet, if he exercises his discretion and actually does arrest, he is liable. The language of *ABBOTT, J.*, in *Morgans v. Bridges*, 1 B. & Ald. 652, supports this view. "If the party complaining would make the Sheriff liable, he should go further in his allegations and proofs; he should state and prove that he had a debt due from a party called by both names, and that he so told the sheriff at time of the arrest. The sheriff might then perhaps be bound to detain him in custody, and might be liable for an escape." There is no distinguishing an estoppel by the defendant's executing a bond in a wrong name, and an estoppel by his once calling himself by that name. [*COLERIDGE, J.* It is consistent with this record that Studdy entered into the contract, on which he was sued, in his right name. If the plaintiff had alleged that the contract was made in the name of William, the case would have been a stronger one.] It is alleged that he admitted his name to be William, before the debt accrued. As to the effect of the misnomer in the event of resistance and death, if the arrest was lawful by reason of the estoppel, the consequence of resistance will be the same as in other cases of lawful arrest.

W. H. Watson, in reply. The material issue taken on this record is the fact, that Studdy was known by both names; the rest of the plea is superfluous. [*LITLEDALE, J.* Then why not conclude it to the country?] That would have been a good objection on special demurrer. *Price v. Hurwood*, 3 Camp. 108, only shows that the misrepresentation, by the party arrested, of his real name, is a justification of the arrest if properly pleaded. It would at least be evidence upon the allegation that he was known as well by one name as the other. *Morgans v. Bridges*, 1 B. & Ald. 647, is exactly in point. It would be absurd that a party should be estopped for ever from taking advantage of a misnomer, because he is alleged, by a third person, to have formerly admitted a wrong name.

LORD DENMAN, C. J. The declaration is, in effect, for taking insufficient bail, and is in itself a good one. The plea is an answer to it. It alleges that Studdy was not, at the time of the arrest, known as well by the name of William as Frederick, and goes to make some superfluous statements, which, as they are chiefly in answer to improper statements in the declaration, are no just ground of complaint on the part of the plaintiff. The averment of the plaintiff in the declaration, that Studdy had often admitted to the plaintiff that he was known by the name of William, is not alone enough to support the declaration; it is only evidence of the fact. *Morgans v. Bridges* is in favour of the defendant, and shows that he was not bound to arrest under circumstances which might have justified him in doing so if he chose to take his

chance; and that, having arrested the party, he was not bound to detain him when informed of the misnomer. The facts of this case, supposing them to be truly alleged, would probably have justified the detention of Studdy; for I cannot think the opinion of Mr. Justice HOLROD, 1 B. & Ald. 652, in that case quite correct, that using a name on one occasion only would not, as between the plaintiff and the sheriff, support an allegation that the party was known by that name. If the debt was contracted by the original defendant in the wrong name, I think it would be properly left to a jury as evidence upon such an issue. I cannot accede to the doctrine contended for, that, if the sheriff, though not bound to arrest, exercises his option and actually arrests, he is then liable to all the consequences which attach to an arrest under ordinary circumstances. As to the conclusion of the plea with a verification, that objection is not open on general demurrer.

LITTLEDALE, J. The averment, that Studdy was known as well by one name as the other, whereof the defendant had notice, was enough to support the declaration; and the omission of it would have made it bad; for the alleged admission by Studdy is mere matter of evidence, and taking it even as evidence, it might have been made under circumstances that would entitle it to no weight. The plea, after denying this averment, should have concluded to the country, and would then have been a complete answer; instead of which, it goes on to allege matters quite immaterial, which neither deny, nor confess and avoid, any statement of the plaintiff, and which would have been ground of special demurrer. Throughout the rest of the pleadings, both parties go on pleading in parallel lines without coming to any issue, and without making any relevant allegation.

WILLIAMS, J. The argument for the plaintiff relies entirely on the admissions alleged in the declaration to have been made by Studdy. These admissions are not in fact traversed by the plea; for the admission denied by the plea is an admission upon being arrested, which is not stated in the declaration. But the principal and material averment in the declaration is answered; the rest is redundant. The sheriff was not bound to arrest; and if it be granted that he was justified in the arrest at first, he was not bound to detain on receiving better information.

COLERIDGE, J. The only substantial inquiry is, whether the declaration be good? and, if it is, whether the plea be so? It is contended that there are two good causes of action disclosed in the declaration, and that only one is answered. But the second part of the averment in the declaration, which states the frequent admissions by Studdy, would not alone support the action; and this is the only part unanswered by the plea. It is in truth a statement of evidence in affirmance of the first part, and which might perhaps have been admissible in proof of it, and so have justified the arrest. Nor does the admission appear to have been at all connected with the contract, so as to have the effect of an estoppel. The sheriff may arrest, or not, in his discretion; and the option continues after the arrest, so that he may discharge the party on being better informed of the facts.

S.

Judgment for the defendant. (a)

(a) See *Reeves v. Slater*, 7 B. & C. 486, (14 E. C. L. R. 91,) in which the distinction between a misnomer in mesne and final process was adverted to, and the sheriff was held bound to execute a *fi. fa.* upon the goods of a defendant misnamed in it, where the defendant himself was estopped by the judgment from objecting to the misnomer.

IBBS against RICHARDSON and others.—p. 849.

Lessee for a term ending on 11th October, underlet to C. from year to year, subject to the determination of his own interest. Upon the expiration of the term, C. refused to quit, and held over against the will of the lessee. On 16th October the lessee distrained on him for rent due before the 11th. On 14th December C. quitted; and the lessee then tendered possession to the original landlord, who refused to accept it. Held, that the lessee was liable, in an action for use and occupation, to pay rent to his landlord for the period between the 11th October and 14th December, but not for any longer period.

DEBT for the use and occupation by the defendants of certain premises of the plaintiff for one year.

Plea; *nunquam indebitatus*; issue thereon. By consent of the parties, and by a Judge's order, the following case was stated for the opinion of this Court.

On the 3d of December, 1827, the plaintiff, by writing under seal, demised to Anna Maria Hughes, her executors, &c., the premises mentioned in the declaration, for eight years beginning from the 11th of October then last past, at the yearly rent of 20*l*.

From and after the execution of this instrument, A. M. Hughes continued in the possession and occupation of the premises upon the terms therein mentioned, until her death in the beginning of February, 1829. Defendants were the executors of Hughes, and had proved her will and acted in the execution thereof. After the death of A. M. Hughes, defendants, as such executors, proposed to plaintiff to surrender the premises to him, but plaintiff refused to accept such surrender; whereupon defendants underlet the premises to Robert Craik from year to year subject to the determination of their own interest therein as executors, at the same yearly rent of 20*l*.; and Craik entered into the possession of the said premises as their undertenant, and continued in the occupation until 14th December, 1835, under the following circumstances. The original rent was duly paid to plaintiff by defendants up to the 11th day of October, 1835. On that day defendants, being desirous of delivering up possession of the premises to plaintiff, demanded possession from their undertenant, Craik, who refused to quit, and continued, against defendants' will, to occupy them. On the 16th of the same October, 10*l*. rent being in arrear from Craik to defendants, they distrained upon his goods, and continued in possession thereof upon the premises in question until the 22d of the same month. After, as well as during the continuance of, this distress, defendants endeavoured to induce Craik to quit the premises; and on the 14th of December following he did quit. No rent or compensation of any kind was received by defendants for the period between the 11th of October and the 14th of December, 1835. Plaintiff was aware of all the above circumstances; but no direct communication took place between him and defendants until the said 14th of December. On that day, the key of the house and possession of all the premises were offered by defendants to plaintiff. Plaintiff however refused the key, unless defendants would pay him a quarter's rent, but stated that, if defendants would then pay a quarter's rent, he would accept the key, and release defendants from all liability. Defendants refused to make such payment; and the key remained in their possession, and the premises were in fact unoccupied, from that time to the 11th of October, 1836. Power was given to the Court to draw inferences of fact from the case stated; and if the Court should be of opinion, under

the above circumstances, that the plaintiff was entitled to recover any sum of money in this action, defendants were to confess judgment, and judgment was thereupon to be entered up for such sum as the Court should think plaintiff entitled to recover, with costs, &c.

Biggs Andrews, for the plaintiff. The plaintiff is entitled to recover rent, if not for one year, at least for the period during which the undertenant wrongfully held over. The tenant's responsibility does not cease until redelivery of the premises to the lessor; and the exertions of the former to expel the undertenant cannot affect the plaintiff's rights. As long as the undertenant occupied, the defendants were also in sufficient occupation for the purposes of this action: *Bull v. Sibbs*, 8 T. R. 327; *Matthews v. Sawell*, 8 Taunt. 270, (4 E. C. L. R. 101.) Actual occupation is not necessary; *Pinero v. Judson*, 6 Bing. 206, (20 E. C. L. R. 56.) *Harding v. Crethorn*, 1 Esp. 57, is in point, and shows that nothing but redelivery of the premises, or acceptance of another tenant by the lessor, will release the lessee. Here the plaintiff expressly refused to accept the key of the premises; and the defendants, by distraining after the determination of their own interest, acted as owners of the property under stat. 8 Anne, c. 14. s. 6, which gives the landlord power to distrain after the end of the tenant's term, provided such distress be made "during the continuance of the landlord's title or interest."

Platt, contra. It is not denied that the holding by an undertenant, with the assent of the lessee, will make the latter liable: but the defendants are not to be made tenants against their will. The declaration in this form of action always alleges a holding at the instance and request of the defendant. Here there is no ground for saying that any part of the occupation after the 11th of October was voluntary on the part of the defendants. The declaration also alleges occupation by the permission of the plaintiff; if, therefore, the occupation of the undertenant is that upon which the plaintiff relies, then the undertenant occupied with the plaintiff's assent, and so the defendants are discharged by the acceptance of another tenant, as in *Harding v. Crethorn*, 1 Esp. 57. By offering to surrender and endeavouring to remove the undertenant, the lessees have done all that lies in their power to relieve themselves from the relation of landlord and tenant; and the plaintiff must complete his possession by bringing ejectment and suing Craik for the mesne profits. But it would be absurd to hold the defendants liable for mesne profits which they never received nor desired to receive. As to the distress by them, they had no reversion, and therefore no right to distrain. They were mere trespassers, and might be sued as such; or the plaintiff might, perhaps, sue them for not redelivering, if the dictum of Lord KENYON, in *Harding v. Crethorn*, be good law.

B. Andrews, in reply. The doctrine of Lord KENYON is decisive, and has not been answered. Until the lessee surrenders the premises, so as to enable the lessor to take possession, he continues to hold them, and to be liable for rent in respect of such holding.

Lord DENMAN, C. J. The plaintiff is entitled to recover. If the defendants, after the expiration of their lease, had let the premises anew to Craik, the case would have been a very clear one. Here they distrained, as upon a continuance of their own interest, and did not offer to deliver up the key, or the possession, until the 14th of December. When Craik held over, there was a sufficient reversion, as between them and Craik, to enable them to distrain if they pleased. The defendants, however, are only bound to pay rent up to the 14th of Decem-

ber, when the undertenant had quitted and possession was tendered to the plaintiff.

LITTLEDALE, J. No doubt the ordinary course under these circumstances would be to bring ejectment; but the plaintiff may waive the tort, and sue for use and occupation; or he might have maintained an action for not delivering up possession. After a recovery in ejectment, he might have recovered mesne profits until the day when the possession was tendered to him; so here he may recover rent for that period. Craik's possession, being obtained by and through the defendants, is to be taken as their possession. If the original tenancy had been from year to year, the defendants would have been liable for a whole year's rent. Here, the holding over being a wrongful one after the expiration of a term, the plaintiff is entitled to recover only for the period during which he was kept out of possession.

WILLIAMS and COLERIDGE, Js., concurred.

S.

Judgment for the plaintiff for the recovery of 5*l*.

BROOKS against STUART.—p. 854.

Assumpsit by indorsees against the maker of a promissory note. Plea, that the promise was a joint and several one by defendant and A., to whom one of the plaintiffs executed a release under seal. Replication, that the release was executed at the request of defendant, who afterwards, and while the note was unpaid, in consideration of such release, ratified his promise, and promised to remain liable to plaintiffs for the amount of the note. Held bad, because it set up a parol exception to a release under seal.

To the same plea, pleaded to the common money counts, a replication traversing both the joint and several promise, and also the release, was admitted to be bad on special demurrer.

ASSUMPSIT by the public officer of a banking company, (under 7 G. 4, c. 46, s. 9,) as indorsees of a promissory note made by the defendant. Money counts.

Plea; that one Watson, before and at the time, &c., was a partner in the said company, and, as such, jointly interested with the other partners in the company in the said causes of action; and that the promises mentioned in the declaration were made jointly and severally by defendant and one Agar: and that, after the making of the said promises, Watson by indenture released to Agar the said causes of action, and thereby also released defendant from the same. Verification.

Replication to the plea, so far as it related to the first count, that Watson executed the release at the request, and by and with the privity and concurrence, of defendant, for the purpose of releasing Agar from payment of the said promissory note, and from the cause of action of the company thereupon against Agar; and that thereupon afterwards, the note being still unpaid, in consideration of the premises and that Watson had, at defendant's request, so released the said Agar, defendant ratified and confirmed the promise in the first count mentioned, and promised the company that he would be, and remain, liable to them for the amount of the note, as if the indenture had not been made. Verification.

Replication to the plea, so far as it related to the promises in the other

counts, that those promises were not made jointly and severally by defendant and Agar, as therein mentioned; nor did Watson release the said last mentioned causes of action. Conclusion to the country.

Demurrer to the first replication, assigning for special causes that it was a departure; that it was double; and that the matter, if pleadable at all, should have been pleaded by way of estoppel.

Demurrer to the second replication, assigning for special causes that it was double; that it put in issue too many averments; that it amounted to a general replication *de injuriâ*, &c.

Martin, for the defendant. The banking company, though enabled to sue by their officer, are not a corporation; but their rights and liabilities remain as before, just as if the individuals who composed it were the plaintiffs on the record; *Hall v. Franklin*, 3 M. & W. 259. The release is therefore an answer. A release *by* one of several plaintiffs is a bar as to all; *Ruddock's Case*, 6 Rep. 25, a. So a release *to* one of several, who are jointly and severally bound, is a release to all; note (1) to *Fowell v. Forrest*, 2 Wms. Saund. 48. The plea is therefore good. Then, as to the replications, the first either founds itself on the subsequent ratification as preventing the effect of the release, in which case *Cocks v. Nash*, 9 Bing. 341, (23 E. C. L. R. 300,) is an authority in point against the plaintiff; or else it sets up the subsequent promise as a new ground of action, in which case it is a clear departure. Such a promise, founded on a consideration properly alleged, might perhaps be a good independent cause of action; but even this is doubtful; for in *Hannan v. Roll*, Note (1) to Butler's Co. Lit. 232 a, from Lord NOTTINGHAM'S MS., it was held that one whose co-obligor had been released by the obligee could not be sued on a new promise in consideration of forbearance. (a) As to the second replication, it traverses two distinct facts alleged in the plea, viz. the joint promise and the release, either of which may be denied, but not both. The law on this point is discussed in *Selby v. Bardons*, 3 B. & Ad. 2, (b) which shows that such multifarious traverse is bad, except in cases where the replication *de injuriâ absque tali*, &c. is applicable.

R. V. Richards, contra, admitted that the second replication could not be sustained. As to the first; the facts disclosed exclude the operation of the release. The cases of the Statute of Limitations, infancy, and bankruptcy are analogous. The subsequent promise, which takes a case out of the statute, is not a substantive cause of action; it only defeats the operation of the statute. The replication to a plea of infancy, stating a ratification after full age, is not the statement of a new cause of action, but a revival of the original one. So, in the case of bankruptcy, a subsequent promise excludes the effect of the certificate. The intent of the parties is to be considered; and when the release of one is accompanied by a contemporary agreement that the other shall continue liable, the legal operation of the release is confined, and the party is remitted to his action on the original contract. The reasoning of the Court in *Irving v. Veitch*, 3 M. & W. 90, 105, supports the plaintiff in suing on the original rather than any substituted contract. The matter pleaded does not depart from, but confirms and fortifies, the declaration, Com. Dig. *Pleader*, F. 11.

Martin, in reply, was stopped by the Court.

(a) See S. C. nom. *Hammon v. Roll*, March. New Ca. 202, (2d ed.)

(b) See Parke, J., *Ibid.* (10,) (23 E. C. L. R. 9.)

Lord DENMAN, C. J. The replication is bad. It sets up a parol exception to an instrument under seal.

LITTLEDALE, WILLIAMS, and COLERIDGE, Js. concurred.

S.

Judgment for the defendant.

LAPIERRE against M'INTOSH.—p. 857.

TRESPASS for entering plaintiff's house and expelling him. Plea, that plaintiff was an alien artificer; that defendant unlawfully agreed to grant, and plaintiff to take, a lease of the house for 21 years; that plaintiff took possession on the faith and terms of such agreement, and with the view and intent to carry the same into execution, and not otherwise; therefore defendant entered, &c., the door being open and no person therein of whom he could demand possession.

Held, that the plea was good, as showing either a lease void by stat. 32 Hen. 8, c. 16; or possession in pursuance of an illegal agreement for such a lease; and that in either case the plaintiff could not maintain the action.

TRESPASS for breaking and entering plaintiff's dwelling house, and expelling him.

Plea 1. Not Guilty. 2. That, before plaintiff had any thing in the said dwelling-house, defendant was seised in his demesne as of fee of and in the same; and that plaintiff, at the time of making the agreement thereafter mentioned, was a stranger artificer and handicraftsman, to wit, a boot and shoemaker, born out of the obeisance of the King of this realm, to wit, in the kingdom of France, and not a denizen or naturalised: that before the said time, when, &c., by an agreement in writing made between plaintiff and defendant, and signed by them, it was, wilfully and contrary to the statute in such case made and provided, agreed by and between plaintiff and defendant as follows; that is to say; defendant agreed to let the said dwelling house to plaintiff, and to grant a good and valid lease thereof for the term of twenty-one years to plaintiff, at the clear yearly rent of 70*l.* payable quarterly, to commence from Michaelmas then next, the said lease to contain usual and proper covenants, especially to paint, pay rates, taxes, &c.: that plaintiff thereby agreed to take the house and to accept the said lease at the said rent, &c., and to execute a counterpart thereof; the said lease to be determinable at the expiration of the first seven or fourteen years on the plaintiff giving six months' notice thereof in writing: that thereupon, and before the said time when, &c., defendant, at plaintiff's request, delivered to plaintiff possession of the said house, and plaintiff then took and continued in possession thereof on the faith and terms of the said agreement, and with the view and intention that the same should be carried into execution and the lease granted as aforesaid, and not otherwise; whereupon defendant at the said time when, &c., entered into the said house, the outer door thereof being open, and no person being therein of whom defendant could demand possession as he intended to do, and otherwise would have done, and committed the several trespasses, &c. Verification.

Demurrer, assigning for special causes that the instrument was an agreement and not a lease; that no permanent estate or interest passed to plaintiff; and that plaintiff was only tenant at sufferance, or from year to year.

C. C. Jones, for the plaintiff. The question is whether this is a lease

to a stranger artificer and handicraftsman, and therefore void by stat. 32 Hen. 8, c. 16, s. 13. It is an agreement only, and no lease. The words of agreement to grant, and to accept, a lease, do not make a present demise; and, although possession was in fact given, there was no agreement to do so. All the cases are collected in *Doe dem. Pearson v. Ries*, 8 Bing. 178, (21 E. C. L. R. 261,) and *Staniforth v. Fox*, 7 Bing. 590, (20 E. C. L. R. 249.) Unless there be a lease within the statute, the interest of the plaintiff under the agreement is not avoided. (a)

Chandless, contra. This is a lease, and therefore void. [Lord DENMAN, C. J. If so, why did you not plead it as such, instead of treating it as a mere executory agreement?] The Court will put the proper construction on the instrument. If it be only an agreement, then, without reference to the statute, the plaintiff, being let into possession by the defendant, was tenant at will to him, and the tenancy was determined by the entry of the defendant. Entry, in the absence of the tenant, is enough for this purpose: Co. Lit. 55 b. Even a wrongful entry, without the consent of the tenant, is a determination of the will: Com. Dig. *Estates*, (H. 7.) [LITTLEDALE, J. There was no demand of possession.] It is stated that there was no one on the premises of whom possession could be demanded; otherwise the defendant would have done so. A person, let into possession under an executory agreement, may be ejected by the landlord without notice, where there is no stipulation to the contrary, and no payment of rent: *Hegan v. Johnson*, 2 Taunt. 148.

C. C. Jones, in reply. The plaintiff, who took possession under an arrangement collateral to the agreement for a future lease, had a sufficient interest to maintain trespass for an entry merely wrongful, whether it determined the will or not.

LORD DENMAN, C. J. Whether this agreement be a lease within the stat. 32 H. 8, c. 16, or whether the entry be sufficient to determine a tenancy at will, may be doubtful; but, at all events, the plaintiff does not appear to have any interest which the law can recognise, and he can therefore maintain no action.

LITTLEDALE, J. Either the interest of the plaintiff was by lease, and consequently void by the statute; or it was a tenancy at will created in furtherance of an unlawful agreement, which the defendant may at any time put an end to by entry.

WILLIAMS, J. The plea is good on the ground that the plaintiff's possession, if not under a lease, was under an agreement for one in violation of the statute. Such being the case, it was competent for the defendant to enter and expel the plaintiff.

COLERIDGE, J. The plea states an agreement which was equally illegal, whether it amounted to a lease or was only an agreement for one. The possession is stated to have been delivered to the plaintiff and taken by him "on the faith and terms of the agreement, and with the view and intention that the same should be carried into execution." Under such circumstances the plaintiff cannot maintain an action for the re-entry by the defendant.

S.

Judgment for the defendant.

(a) See note (1) to *Jervin v. Hurridge*. 1 Wms. Saund. 8, and Co. Lit. 2 b.

WEEDING against ALDRICH.—p. 861.

Trover for several deer. Plea, as to the conversion of one deer, that it was wrongfully on defendant's close doing damage; wherefore defendant seized it as a distress; which seizing is the same conversion, &c. Held, on special demurrer, that the plea was good without the formal commencement of actionem non, or prayer of judgment:

Held also, (LITTLEDALE, J., dubitante,) that it sufficiently confessed a conversion in fact, and was not bad as amounting to the plea of not guilty, or as an argumentative denial of plaintiff's possession; and that it was unnecessary to allege how defendant disposed of the distress.

Semble, that if the conversion, relied on by the plaintiff, was not the seizure, but a subsequent abuse of the distress, he must show it in reply to the plea.

TROVER for two reclaimed deer, and two other deer.

Plea 1. Except as to one deer, Not Guilty. 2. Except as before, actionem non, because, &c., that the plaintiff was not possessed. 3. As to the conversion of one of the deer, that defendant was possessed of a certain close, and, because the said deer before and at the time when, &c., was wrongfully on the said close doing damage there, defendant seized and took the said deer in the said close, so damage feasant, as a distress for the damage so done and doing by the said deer as aforesaid; which said seizing and taking is the same conversion whereof, &c.: verification. This last plea had no commencement with actionem non, nor any prayer of judgment. Demurrer to the third plea, assigning for special causes (amongst others) that it amounted to the general issue; that it was an argumentative denial of an unlawful conversion, and of the plaintiff's possession of the deer at the time of commencing the action; that the plea did not show how the distress was disposed of, and that, though it was pleaded to part, there was neither actionem non, nor prayer of judgment. Joinder.

Gunning, for the plaintiff. The commencement by actionem non, and the conclusion by a prayer of judgment, are necessary where the plea is not in bar of the whole action. Reg. Gen. Hil. 4 W. 4, (*General Rules and Regulations*, 9.) The plea is pleaded only as to one of the deer. The defendant has inserted the formal commencement in his second plea, but has omitted it in the third. [*Byles*, contra, in answer to a question by the Court. The Court of Exchequer have expressed an opinion that the new Rule only requires the form of "actionem non" to be adopted where the plea is in bar, not of the whole action, but of the further maintenance of it; *Putney v. Swann*, 2 M. & W. 72; and there are other unreported cases to the same effect in that Court. This construction is reasonable, for, in the latter case, the judgment is different.] In *Putney v. Swann*, and in *Bird v. Higginson*, 2 A. & E. 696, (29 E. C. L. R. 177,) the plea was to the whole of one count. But the plea is also bad as amounting, either to the general issue, or to a plea of not possessed. It admits no conversion, but denies it indirectly. The plea would have been bad before the New Rules; *Hartford v. Jones*, 3 Salk. 366, S. C. 1 Ld. Ray. 393; and is equally so since. The facts pleaded show that the defendant has not converted the deer, but taken it in pursuance of a legal right; if so, not guilty is still the proper plea. *Owen v. Knight*, 4 New Ca. 54, (33 E. C. L. R. 277,) shows that a lien is proper evidence on a plea that plaintiff was not possessed, &c.; and *Scarfe v. Morgan*, 4 M. & W. 270, seems to show that it is admissible, either on a plea of not guilty, or a plea denying the property. *Samuel v. Duke*, 3 M. & W. 622, may perhaps be cited to show that facts, justifying a seizure of goods under an execution, should be specially pleaded: but the decision on that point was not necessary; for the

STORR against LEE and Wife.—p. 868.

Discharge of the wife under the Insolvent Debtors' Act, 7 G. 4, c. 57, before marriage, is a bar to an action against husband and wife in respect of one of the scheduled debts.

Seem, that where a discharged female insolvent acquires property and marries, whereby the property vests in her husband, the statute affords no remedy by which it can be made available to her former creditors.

DEBT for goods sold to defendant's wife before her marriage. Plea, that the wife was discharged from the debt under the act for the Relief of Insolvent Debtors, (7 G. 4, c. 57,) while sole and unmarried. General demurrer and joinder.

E. V. Williams, for the plaintiff. If this plea is a bar, there will be no remedy for the creditor of a discharged insolvent who marries, whatever amount of property she may have acquired after her discharge. No execution can be taken out on the judgment entered up against her upon the warrant of attorney given by her under sect. 57, because, after marriage, she can have no "ability to pay" within that section. Sects. 58 and 59 are equally inoperative; for she cannot assign or transfer any bills, notes, or other property; and the interest of the husband in all her property will prevent any order from being made under either of those sections. Whether the after-acquired property became vested in the insolvent before or after marriage, is immaterial: in either case, the act provides no means of making it available after she has escaped from her liability by marriage. If, therefore, the act provides no remedy, the ordinary remedy at common law must attach against the husband and wife, as it cannot be supposed that the legislature intended to release the debt altogether. The wife's debt, mentioned in her schedule, is discharged on the condition only of her giving an available security against her future property. If it becomes a nullity by her marriage, the consideration for her discharge fails, and payment of the debt may be enforced by action. The plea given by the statute, sect. 61, is given only to the person discharged, "and his or her heirs, executors, and administrators," and not to any other person. The husband has no such plea given to him. The wife should therefore plead it separately, if she is entitled to plead it at all; and then the plaintiff may enter a nolle prosequi as to her, and proceed against the husband; *Bovill v. Wood*, 2 M. & S. 23. If the wife had become insolvent after marriage, and had been discharged under sect. 71 as to her separate property, the husband would have continued liable by the express provisions of that section; and if both had been sued for her debt, she must have pleaded separately. Then why should she not plead separately to this action? The wife's debt becomes so completely the debt of the husband that it is barred by, and proveable under, his bankruptcy; *Miles v. Williams*, 1 P. Will. 249; and it is discharged by his insolvency; *Lockwood v. Salter*, 5 B. & Ad. 303, (27 E. C. L. R. 82.) There is nothing hard in holding him liable here, for he obtains this advantage, that, if the wife dies, his liability ceases, although he may keep all the property which came to him through her.

R. V. Richards. The effect of the marriage is to suspend the lia

bility of the wife during coverture. And there is no particular hardship in the case; for a *bonâ fide* sale by her before marriage would have equally defeated the creditors. If she had acquired no property before marriage, it would be giving an advantage to the creditors to permit them to sue the husband, when the wife herself could not have been sued while sole. It is, in fact, a new attempt to revive the liability of a discharged insolvent by reason of marriage. As to the plea being given to the wife alone, this is, in point of law, a plea by her, although the rules of law require that the husband should be joined for conformity. If she cannot plead in this way, she can have no plea at all, and must lose the benefit of the statute. *Lockwood v. Saller* was the converse of this case; and the plea was there allowed to the wife jointly with the husband, although it was there contended, as now, that the plea was given only to the husband.

E. V. Williams, in reply. The exemption of the wife is no reason that the husband should not be subject to the usual liability for her debts. There is nothing in the act to extinguish them. [COLERIDGE, J. Does not an action lie against a husband only in respect to the cause of action against his wife?] The law is not so laid down: the rule is, that the husband is liable for the wife's debts. [LITLEDALE, J. That is only a loose way of laying down the same proposition.]

LORD DENMAN, C. J. The plea is an answer to the action. The seventy-second section of the act was a provision introduced in consequence of the decision of this Court in *Ex parte Deacon*, 5 B. & Ald. 759, (7 E. C. L. R. 253.) If it be desirable that liability should attach to the husband or wife under the circumstances of this case, the act must undergo still further amendment. The plea is given to the wife jointly with her husband; and the only consequence is, that there may be some property which cannot be reached under the act.

LITLEDALE, J. The case appears to be one not contemplated by the statute. With respect to the alleged hardship upon the creditor, it may be said, with equal justice, that a different construction of the act might operate with hardship on the husband.

COLERIDGE, J. (a) The case has been ingeniously argued for the plaintiff; but there is no ground for the action. The effect of marriage upon property acquired after insolvency has probably been overlooked; and some inconvenience or injustice may possibly accrue; but we must look solely to the act of parliament. On complying with its provisions, the insolvent was clearly discharged from all further liability to an action in respect of previous debts; and there is nothing to revive the action against her, or her husband, on the event of marriage.

S.

Judgment for the defendant.

(a) *Williams, J., was absent.*

The QUEEN against The Recorder of BATH.

(In the Matter of the BATH Borough Rate.)—p. 871.

Under stat. 5 & 6 W. 4, c. 76, s. 92, the appeal to quarter sessions against a borough rate is given only in the case of unequal apportionments of the rate among the parishes subjected to it, or the total omission of parishes which ought to be so subjected; no appeal is given to persons aggrieved as individuals.

JOSEPH ADDISON had obtained a rule in Michaelmas term last, calling upon the recorder of the city and borough of Bath to show cause why a mandamus should not issue, commanding him to enter continuances and hear the appeal of W. P. Roberts against a borough rate made in and for the said borough on 14th July last.

At the Bath borough sessions in July, 1838, W. P. Roberts, a rate payer in the parish of Lyncombe and Widcombe, in the city and borough of Bath, appealed against the rate, on the ground that it could be proved to be retrospective and excessive, a part of it being, as the appellant alleged, for the payment of a bygone debt. The appellant referred to stat. 7 W. 4 & 1 Vict. c. 81. The rate was for 6866l. 2s., apportioned among the six parishes of Bath, of which Lyncombe and Widcombe was one. It was not contended that the rate was bad on the face of it, or improperly apportioned. The necessary notices were proved on the part of the appellant. The appeal, having been respite, came on for hearing at the Bath October sessions, 1838, when the recorder held that he had no jurisdiction, and declined to hear the appeal. The deponent now swore to the truth of the above facts, and that he was aggrieved by the rate. In Michaelmas term last, (a)

Sir W. W. Follett and Hodges showed cause. First, the rate itself is not objectionable on the ground assigned. (On this point, they referred to stat. 7 W. 4 & 1 Vict. c. 78, s. 44, *Rex v. Sillifant*, 4 A. & E. 354, (31 E. C. L. R.,) *Rex v. The Justices of Flintshire*, 5 B. & Ald. 761, (7 E. C. L. R.,) *Rex v. The Mayor, &c., of Gloucester*, 5 T. R. 346, stat. 17 G. 2, c. 38, s. 4, *The Attorney-General v. The Corporation of Poole*, 2 Keene, 190, (b) and *Woods v. Reed*, 2 Mee. & W. 777; but the Court gave no decision.)

Secondly, supposing the rate objectionable on the ground assigned, still the recorder had no jurisdiction. His power is under stat. 5 & 6 W. 4, c. 76, s. 92, which, after giving the council power to order the making of a borough rate in the nature of a county rate, enacts that "if any person shall think himself aggrieved by any such rate it shall be lawful for him to appeal to the recorder hereinafter mentioned at the next quarter sessions for the borough in which such rate has been made, or in case there shall be no recorder within such borough, to the justices at the next court of quarter sessions for the county within which such borough is situate or whereunto it is adjacent; and such recorder or justices respectively shall have power to hear and determine the same, and to award relief in the premises, as in the case of an appeal against any county rate." Now the case of an appeal against a county rate would be determined by stat. 55 G. 3, c. 51, s. 24, which enacts "that if the churchwarden or churchwardens, overseer or overseers of the poor, or other inhabitant or inhabitants of any parish, township, or place, whether parochial or otherwise, where there is no churchwarden or overseer, or person appointed to act as such, shall at any time have reason to think that such parish, township, or place, is aggrieved by any rate now existing or hereafter to be made, either in pursuance of this act or of any act or acts now in force, whether it be on account of the proportions assessed upon the respective parishes, townships, or places being unequal, or on account of some one or more of them being without sufficient cause omitted altogether from the rate, or on account of

(a) November 24th. Before Lord Denman, C. J., Patteson and Williams, Ja.

(b) See p. 196.

such parish, township, or place being rated at a higher proportion of the pound sterling according to the fair annual value of the rateable property therein, or on account of some other parish or parishes, township or townships, place or places being rated at a lower proportion of the pound sterling according to the fair annual value of the rateable property therein, than has been fixed and declared by the justices of the peace of the said county in sessions assembled, as the basis of the rate of the said county, or on account of any other just cause of complaint whatsoever; it shall be lawful for such churchwarden," &c., "or other inhabitant or inhabitants where there is no churchwarden or overseer, or person appointed to act as such, to appeal to the justices of the peace for the county, at any general or quarter sessions, against such part of the rate only as may affect the parish or parishes, township or townships, place or places, which are unequally rated, or which shall appear to be overrated or underrated, or omitted altogether from the rate; and the said justices are hereby empowered to hear and finally determine the same, and either to confirm such parts of the rate as have been appealed against, or to correct such inequalities, disproportions, or omissions, as shall be proved to exist therein, in such manner as to them the said justices shall appear fair, just, and equitable." Under this statute, the grievances in respect of which an appeal is given are such only as affect a whole parish in its relation to other parishes, that is, such as involve questions respecting the proper distribution of the rate; *Rex v. The Justices of Westmoreland*, 10 B. & C. 226, (21 E. C. L. R.) The question arose in *Rex v. Bond*, 6 A. & E. 905, (33 E. C. L. R.) but that case was ultimately decided on another ground. [Lord DENMAN, C. J. There the notice did not show that the appellant was aggrieved: here the notices were correct, as is admitted.] The nature of the grievance is not within the statutes. It is true, as was suggested by COLERIDGE, J., in *Rex v. Bond*, that there may be boroughs containing only one parish: but in that case the statutes give no appeal; and this may have been intended. Stat. 5 & 6 W. 4, c. 76, s. 92, gives indeed the remedy to "any person" who "shall think himself aggrieved" by the borough rate; but that must, as in cases under stat. 55 G. 3, c. 51, s. 14, be construed with reference to the nature of the grievance. If a township which had no parish officer were unequally assessed, then any inhabitant might appeal, as representative of the parish, and aggrieved in that character. The word "overseers," in stat. 5 & 6 W. 4, c. 76, means, by sect. 142, "all persons who execute the duties of overseers of the poor." The word "person" must be understood with reference to the whole object and effect of the statute, as in *Cortis v. The Kent Waterworks Company*, 7 L. & C. 314, (14 E. C. L. R.), *Boyd v. Croydon Railway Company*, 4 New Ca. 669, (33 E. C. L. R.) Stat. 33 G. 3, c. 55, s. 1, furnishes an instance of the appeal being given to "any person" who "shall be aggrieved," where the parish officers can be aggrieved only as such officers. There will be no hardship in the construction of the act now contended for. The Court of Chancery will inquire into an improper expenditure of the rate; *The Attorney-General v. The Corporation of Poole*, 1 Keen, 190. Besides, as the overseers may now be required, by stat. 7 W. 4 & 1 Vict. c. 81, s. 1, to pay the borough rate out of the poor rate, the common remedies applicable to the case of a poor rate may be resorted to.

Joseph Addison, contra. (The argument as to the first point is

omitted.) As to the second point: assuming that stat. 5 & 6 W. 4, c. 76, s. 92, limits the appeal to such cases only as are within stat. 55 G. 3, c. 51, s. 14, still the present case is within both. For a rate made for a purpose which is retrospective is wholly bad; *Woods v. Reed*, 2 Mec. & W. 777; and therefore the whole parish, not the individual merely, (as in *Rex v. The Justices of Westmoreland*,) is aggrieved. But the appeal against a borough rate is not limited to cases where an appeal would lie against a county rate. The nature of the relief only is the same: in other circumstances they differ. The two rates are applicable to different purposes; a county has not, as a borough generally has, any fund independent of the rate. In the case of a county rate there are many securities which do not exist in the case of a borough rate; as, for instance, those provided by stat. 12 G. 2, c. 29, ss. 7, 8. The legislature cannot have meant to leave boroughs in which there was only one parish without remedy by appeal. *Cur. adv. vult.*

Lord DENMAN, C. J., in this vacation (February 5th) delivered the judgment of the Court. After stating the facts of the case, his Lordship said,

The appellant having stated several objections (apparently of considerable importance) against the said rate, the recorder expressed his opinion to be that he had no jurisdiction to try the case; and whether that opinion is correct or not is the question. And this depends upon the proper construction to be put upon stat. 5 & 6 W. 4, c. 76, s. 92, and stat. 55 G. 3, c. 51, s. 14. And here, as it seems to us hardly possible to suppose it to have been the intention of the legislature that an individual interested and aggrieved should not have the power of questioning the validity of a rate at the sessions, we cannot avoid noticing with regret that recourse should have been had to the method of giving an appeal by reference to another statute, instead of giving it plainly and directly by the statute itself. The former course, however, has been pursued.

The ninety-second section, then, of the first-mentioned act, which authorizes the imposition of a borough rate, gives an appeal in the following words, as applicable to the present case. (His Lordship here read the part of stat. 5 & 6 W. 4, c. 76, s. 92, cited ante, p. 873.)

It becomes necessary, therefore, to ascertain with precision what is the relief which may in that case be awarded. And this depends upon stat. 55 G. 3, c. 51, s. 14, which is as follows. (His Lordship here read the section: see p. 873, ante.)

And from a perusal of this clause it is perfectly obvious that the appeal is given to remedy total omissions of parishes from the rate, or inequalities and disproportions (in relation to each other) in their contributions thereto, and nothing else. *Individual* grievances arising from unequal and disproportionate impositions in each of the parishes, townships, or places, are nowhere mentioned or even alluded to. The grievances and complaints of the *whole* parish, township, or place only are noticed.

And, accordingly, the appeal is given exclusively to the public officer of the district or division, the churchwarden or overseer. When the word "inhabitant" is used, it is not to be understood as being applicable to any individual, but to such only as, for the purpose of appeal, represents some place where the clause supposes neither churchwarden nor

overseer to exist; and who must, therefore, be understood to be placed upon the same footing as churchwardens and overseers.

The relief, therefore, to be awarded at the borough sessions, being expressly declared to be such "as in the case of an appeal against any county rate," and that being restricted in the manner we have seen, we are reluctantly driven to the conclusion that an appeal did not lie to the quarter sessions of Bath, and that therefore the rule must be

Discharged.

ACKLAND against LUTLEY.—p. 879.

Devise to R. and W. in trust that they and their heirs shall set and let the premises, and out of the rents and profits pay a debt of the testator, and certain legacies; devise, from and after such payment to J. B. in fee. Testator, after making his will, demised the premises for a term, which did not expire till after his death, and after payment of the debt and legacies.

Held, that the estate of the trustees determined when the debt and legacies were paid.

A house was demised, habendum for twenty-one years from March 25th, 1809, paying rent on certain days, of which March 25th was one. The estate of which it formed part had been devised by the landlord to trustees to receive the rents and apply them to certain purposes. After the landlord's death, and before the trusts were completely executed, and during the tenancy, the reversion was sold. For a year after this sale, the purchaser received the rents, but, during the subsequent years, from Christmas, 1817, to Lady-day, 1830, they were received by the trustees. The trusts were completely executed in 1821. On March 25th, 1830, the lessee came to the house, (no one being therein,) gave the key to the trustees, and departed. The trustees entered; and the purchaser, who had been present at the above proceeding, and had come to take possession, entered also, but was put back by the trustees, and they remained on the premises.

Held, that if the lessee's term had expired the reversioner's entry would have been good, notwithstanding the entry of the trustees. But that the term, under the above lease, did not expire till the end of March 25th, 1830.

Held, also, that the acts of the lessee on that day did not necessarily import a surrender or a forfeiture.

TRESPASS. First count; for breaking and entering buildings and closes of plaintiff and expelling him, &c.

Second count; for seizing and removing plaintiff's goods and chattels, and placing them on a common highway without his leave.

Third count; for seizing and taking plaintiff's trees, pollards, &c., and converting the same, &c.

Pleas. 1. Not guilty. Issue thereon.

2. To counts 1 and 3; that plaintiff was not possessed of the buildings, &c. at the time when, &c., nor were the trees, &c., the trees, &c., of plaintiff, in manner and form, &c.: conclusion to the country. Issue thereon.

3. To count 1; that the buildings and closes, at the time when, &c., were the buildings and closes, soil and freehold of William Braddick; justification as Braddick's servant: verification. Replication; that the buildings and closes, at the time when, &c., were not the buildings, &c., soil and freehold of W. B., in manner and form, &c.: conclusion to the country. Issue thereon.

4. To count 2; that, before and at the first of the times when, &c., James Pring was lawfully possessed of a certain close adjoining the said common highway; and, because the goods, &c., before and at the said time when, &c., were wrongfully in and upon the said close encumbering the same, &c.; the plea then averred that defendant, as Pring's servant and by his command, at the time when, &c., took and seized the goods and removed and placed them on the said highway, being within

a small and convenient distance, and there left the same for plaintiff's use, doing no unnecessary damage, &c.: verification. Replication, De injuriâ. Issue thereon.

5. To count 2; a similar justification under William Braddick. Replication, De injuriâ. Issue thereon.

6. To count 2; a similar justification under William Toler. Replication, De injuriâ. Issue thereon.

The cause coming on for trial at the Taunton Spring assizes, 1836, a verdict was taken for the plaintiff, subject to the award of a barrister, to whom the cause was referred, with liberty to order a verdict for either party, or a nonsuit, and to raise any question of law on such award. The arbitrator awarded as follows.

"I do specially find and state the following facts. One James Troake, being seised in fee of the dwelling house," &c., "and of the lands," &c., "mentioned in the declaration, by his will," &c., "devised the same as follows:—To Robert Blackmore and William Braddick upon the trusts, and to and for the intents and purposes, thereafter mentioned and declared concerning the same, that is to say: Upon trust that they the said R. B. and W. B. and their heirs do and shall set and let the said premises, and out of the rents and profits thereof do and shall in the first place pay off and discharge the sum of 121*l.* 10*s.* 6*d.* which I do owe to Mary Dyer my servant, and in the next place do and shall pay unto Mary, Hannah, Richard, James and Joan, sons and daughters of my late nephew Richard Blackmore, deceased, the sum of 10*l.* apiece of like lawful money, to whom I give the same, to be paid unto each of them by my said trustees as soon as the clear rents and profits of the said premises will admit of; the eldest of them to be paid first, and so on in rotation one after the other. And, from and after the debt due to Mary Dyer, and the five legacies to the aforesaid children of my said nephew Richard Blackmore, are paid off and discharged, I give, devise and bequeath the same unto John Blackmore, son of the said Richard Blackmore, deceased, to hold the same premises, with the rights, members, and appurtenances thereof, unto the said John Blackmore, his heirs and assigns for ever.

"The testator, James Troake, died in 1811. Previously to his death, he granted a lease of the said premises to one Thomas Pring, for twenty-one years from the 25th March, 1809, at the yearly rent of 30*l.*, under which lease Pring entered and occupied till his death, which happened some time before this action was brought. On the death of James Troake, John Blackmore, the devisee, received the rent of the premises of Pring, the tenant, till Lady-day, 1816, when he sold the same to Richard Ackland, the plaintiff, whose daughter he had married; but the premises were not actually conveyed to the plaintiff till the 12th July, 1817. The plaintiff received the rent of Pring from the time of his purchase at Lady-day, 1816, till Christmas, 1817; when the trustees, Robert Blackmore and William Braddick, received the rents till the death of Robert Blackmore in May, 1824; from which time William Braddick, the surviving trustee, alone received the rents till Lady-day, 1829. Robert Blackmore, by his will, made Edward Lutley, the defendant, and George Braddick, the son of William Braddick, the other trustee, his executors. The debt to Mary Dyer was paid in November, 1815. The legatees were all paid the amount of their legacies previously to June 1821.

"About 12 o'clock at noon on the 25th March, 1830, the plaintiff, with his daughter, the wife of John Blackmore, went to the dwelling-house in the declaration mentioned, in order to take possession of the same. No person was then residing in the house: and the door was locked. The defendant, accompanied by the aforesaid George Braddick, who attended by the directions of his father William Braddick, the surviving trustee under James Troake's will, the parish constable, and others, came also to the said dwelling-house at the said time. Shortly afterwards, James Pring, the representative of the original lessee, Thomas Pring, and who was the person in possession of the premises under the said lease for twenty-one years from the 25th of March, 1809, came with his wife to the door of the dwelling-house, saying he thought it was nearly twelve o'clock, and time to give up possession of the premises. His wife then gave him two keys, which he handed to the defendant and George Braddick, and, having described which belonged to the outer door and which to the cellar, he and his wife went away. The defendant and George Braddick then unlocked the door. The plaintiff and his party immediately attempted to enter the house; but the defendant and George Braddick ordered the constable to keep the plaintiff and those with him from entering the house, which they did by pushing the plaintiff and his party back forcibly. On the defendant and George Braddick entering, they put William Toler into possession, saying they had let the farm to him at 35*l.* per annum; but that if, when the decree came down, (alluding to a suit in the Court of Exchequer instituted by the plaintiff against the trustees to recover possession of the property,) it was given in the plaintiff's favour, they would give up possession. Upon the above state of facts I do find and award as follows:—

1. On the issue upon the first plea: As to
 Count 1. For plaintiff.
 Counts 2 and 3. For defendant.
2. On the second issue. For defendant.
3. On the third issue. For plaintiff.
4. On the fourth issue. For defendant.
- 5 and 6. On the fifth and sixth issues. For plaintiff.

And I do direct that, if the Court should be of opinion that the issue joined on the second plea should, upon the facts stated, have been found for the plaintiff instead of the defendant, and that the issue joined on the replication, so far as the same applies to the third plea, is rightly found for the plaintiff, then I do further find that the damages on such issues are 35*l.* And I do further direct that, if the Court shall be of opinion that any of the above issues are wrongly found, then such issues shall be entered, not as found above, but according to the direction of the Court.

In Michaelmas term, 1837, the plaintiff obtained a rule to show cause why a verdict should not be entered for him on the second and fourth issues. And the defendant, in the same term, obtained a rule to show cause why a verdict should not be entered for him on the third, fifth, and sixth issues.

Erle and Bere, in Michaelmas term, 1838, (*a*) showed cause against the former rule. The arbitrator has found rightly that the plaintiff was not possessed of the buildings and closes mentioned in the second plea and that Pring was possessed of the close mentioned in the fourth plea,

(*a*) November 8th. Before Lord Denman, C. J., Patteson, Williams, and Coleridge, *Js.*

dem. Player v. Nicholls, 1 B. & C. 336, (8 E. C. L. R. 92;) *Warter v. Hutchinson*, 1 B. & C. 721, (8 E. C. L. R. 199;) and *Nash v. Coates*, 3 B. & Ad. 839, (23 E. C. L. R. 192,) are among the later cases in which a limited construction has been put upon devises to trustees. In *Doe dem. Player v. Nicholls*, BAYLEY, J., said, "It may be laid down as a general rule, that where an estate is devised to trustees for particular purposes, the legal estate is vested in them as long as the execution of the trust requires it, and no longer, and therefore, as soon as the trusts are satisfied, it will vest in the person beneficially entitled to it." [PATTESON, J. The generality of that statement has been somewhat qualified since.] (b)

In the cases which may be cited for the defendant, greater powers were always given to the trustees than in the present instance, and a fee has been held to pass, in fulfilment of the testator's evident intention, and to protect the objects of his bounty. Thus in *Doe dem. Tomkyns v. Willun*, 2 B. & Ald. 84, the estates were given to the trustees and their heirs, upon trust to demise for any term they should think proper. In *Doe dem. Keen v. Walbank*, 2 B. & Ad. 554, (22 E. C. L. R. 139,) the leasing power was even larger. Here the devise is, only, to Robert Blackmore and William Braddick, upon trust that they and their heirs "do and shall set and let the said premises," and make certain payments out of the rents and profits. In *Doe dem. Booth v. Field*, 2 B. & Ad. 564, (22 E. C. L. R. 139,) the trustees were, ultimately, to convey the fee. In *Doe dem. Rees v. Williams*, 2 M. & W. 749, the real property was to be equally divided by them between the testatrix's grand-nieces, which was equivalent to a direction to convey. And in *Doe dem. Shelley v. Edlin*, 4 A. & E. 582, (31 E. C. L. R. 143,) the trustee might have had to convey the fee. Many of the prior decisions are commented upon in that case, and the general rule explained and confirmed. If the trustees, in a case like the present, took a fee, it would at most be only a fee determinable when the trusts had been discharged, as was held in *Wellington v. Wellington*, 4 Burr. 2165, cited, Fearn, Cont. Rem. 450, note (b) (9th ed.) and *Doe dem. Brune v. Martyn*, 8 B. & C. 497, (15 E. C. L. R. 276.) In that part of the present will where the testator intended to give a fee, he has expressed that intention in proper words, devising to John Blackmore, "his heirs and assigns for ever."

Erle and *Bere*, contra. The trustees took a fee under the will. The intention that they should do so is implied by the mention of "heirs," though the devise is not directly to the trustees and their heirs. The want of such an express devise is not material if the intent be clear; Com. Dig., *Devise*, (N. 4;) *Shaw v. Weigh*, 2 Stra. 798. Although the decisions are not uniform on the effect of a power to "set and let," the result of the later authorities is that, where the words will carry a fee, and a power of demising is given, to which the Court cannot see a clear limit, an estate in fee is held to pass. *Jones v. Morgan*, 1 Bro. Ch. Ca. 206; *Wright v. Pearson*, 1 Eden's Ca. Chanc. 119; *Gibson v. Lord Montfort*, 1 Ves. sen. 485, and *Doe dem. Beezley v. Woodhouse*, 4 T. R. 89, show the rules which determine the quantity of interest vesting in trustees to whom lands are devised for specific purposes; and these cases favour the construction which gives the larger estate. In *Carter v. Barnadiston*, 1 P. Wms. 505, 509, where an interest short of a fee simple was held to pass, the testator had merely

(b) See *Doe dem. Shelly v. Edlin*, 4 A. & E. 589, (31 E. C. L. R. 143.)

directed that his executors (not mentioning their heirs) should receive the profits of his real estate for the payment of his debts and legacies. *Lord Say and Seal v. Lady Catherine Jones*, 3 Bro. P. C. 113, (a) has been remarked upon as a case by itself. (b) In *Doe dem. White v. Simpson*, 5 East, 162, there were no words of inheritance; the estate given to the trustees was continued in the executors and administrators of the survivor. The decision in *Shapland v. Smith*, 1 Bro. Ch. Ca. 75, proceeded on reasons which do not apply here.

The most important cases in which a question like the present turned upon a leasing power, are *Doe dem. Tomkyns v. Willan*, 2 B. & Ald. 84, and *Doe dem. Keen v. Walbank*, 2 B. & Ad. 554, (22 E. C. L. R. 139,) and, according to these, if the Court cannot clearly ascertain that less than an estate in fee will suffice for the full exercise of the power, a fee will vest. In *Doe dem. Tomkyns v. Willan*, HOLROYD, J., says: "The estate is given to them" (the trustees) "and their heirs in trust, and among other trusts is one, that they should 'devise all the freehold estates for any term they should think proper.'" "The leases were to operate out of the estate given to the trustees themselves. Now such leases could not be valid, unless they took an estate more than commensurate with their duration; and as by the will they have the right to grant leases for any term of years, it follows, that in order to make such leases valid, they must take an estate in fee. It cannot depend upon subsequent events, whether they are to take an estate in fee or not, because they must take that estate in the first instance, on the death of the testator." And ABBOTT, J. assigned as a reason for his judgment that he was unable "clearly to see what less estate than the fee the trustees took, or even what less estate would satisfy all the objects" of the will. The principles which guided the Court in that case were expressly adopted in *Doe dem. Keen v. Walbank*, 2 B. & Ad. 564, (22 E. C. L. R. 142.) And in the earlier case of *Gibson v. Lord Montfort*, 1 Ves. sen. 485, 491, where trustees were held to take the whole legal estate, Lord HARDWICKE said, "Here are purposes to be answered, which by possibility (and that is sufficient) cannot be answered, without the trustees having a fee." [PATTERSON, J. In *Stanley v. Stanley*, 16 Ves. 491, the devise was to trustees and their heirs, on trust that they, and the survivor, and the heirs of the survivor, should receive the rents and profits till T. M. should attain the age of twenty-one, and immediately afterwards should convey to certain uses; and they were held to take an estate determinable on T. M. attaining twenty-one.] That decision is at variance with *Doe dem. Shelley v. Edlin*, 4 A. & E. 582, (31 E. C. L. R. 143,) and *Doe dem. Rees v. Williams*, 2 M. & W. 749. In *Doe dem. Pratt v. Timins*, 1 B. & Ald. 530, where the trustee was held to take only till the heir at law attained twenty-one, the opinion of the Court seems to have been that at that period the legal and equitable estate vested in the heir-at-law without the form of a conveyance.

Here, however, it appears that the power to lease must have existed in the trustees on March 25th, 1830: for, as Pring was in possession before the testator's death, for a term extending to Lady Day, 1830, the power, if it did not then take effect, was nugatory; and it would be

(a) *Lady Jones v. Lord Say and Seal*, 8 Vin. Abr. 262, tit. *Devise* (C. b.) pl. 19.

(b) See *Doe dem. White v. Simpson*, 5 East, 162; *Harton v. Harton*, 7 T. R. 652; *Kenrick v. Lord William Beauclerk*, 3 B. & P. 175.

sufficient, for the purposes of the present case, if the trustees had, at that time, an interest of any duration.

It cannot be contended that the trustees took a determinable fee; because the devise over to John Blackmore would, in that case, be too remote, and void, according to the judgment of Lord HARDWICKE, in *Bagshaw v. Spencer*, 1 Ves. sen. 142, (seep. 134,) being postponed till after payment of the debt and legacies. It is true that those payments were, in point of fact, all made before June, 1821: but, if the devise was void in its creation, subsequent events could not make it valid; *Goodman v. Goodwright dem. Williams*, 2 Burr. 873.

(Crowder mentioned *Doe dem. Cadogan v. Ewart*, 7 A. & E. 636, (34 E. C. L. R. 187,) as a case in which the interest of trustees in estates devised for the purposes of the trusts, had been lately considered.)

Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the Court. After stating the substance of the rules, and the material facts found by the arbitrator, his Lordship said,

The greater question arose on the defendant's pleas, that Braddick was possessed, and that Toler was possessed, which the arbitrator found against him, thereby affirming the plaintiff's title as a purchaser from J. Blackmore and denying that of the trustees. We think the award clearly right in this respect. The case most relied on for the opposite doctrine is *Doe dem. Tomkyns v. Willan*, 2 B. & Ald. 84, recognised by some more recent decisions, in which the circumstance of the trustees having power to lease at their discretion was relied on by the Court as showing the testator's intention to vest an absolute fee in them. Here it is true they have power to set and let, a power which, (it was ingeniously observed,) as Pring's lease would not expire till 1830, could not be acted upon till after that period. But it is not found by the award that Pring's lease was in existence when the will was made; and, if it were, not only is the whole power of the trustees limited to the purpose of paying the specified debt and legacies, but the estate is expressly given over when they are paid. Now that event happened in 1821. It may be added that there might have been a necessity for creating a term for payment of the debts and legacies, for which purpose the power might have been given.

We are next to consider whether the arbitrator was right in finding that the plaintiff was not possessed, and that Pring the lessee was possessed. The acts done by Pring are equivocal; and they do not necessarily import either surrender or forfeiture of the term. But the plaintiff, who was entitled to the reversion, actually entered; and that entry was good if the term had then expired, *i. e.* at 12 o'clock in the day-time on the 25th day of March, 1830. Four cases were quoted to show that it had expired with the preceding day: *Hatter v. Ash*, 1 Lord Ray. 84; *Fitzhugh v. Dennington*, 2 Lord Ray. 1094; *Thomas v. Desanges*, 2 B. & Ald. 586; *Grimman v. Legge*, 8 B. & C. 324, (E. C. L. R. 229.) Of these cases the first named alone applies in any degree to the point; and that is disposed of by Lord MANSFIELD's observations in his admirable judgment in *Pugh v. The Duke of Leeds*, 2 Cowp. 714, to the principle of which we fully adhere. The general understanding is, that terms for years last during the whole anniversary of the day from which they are granted. Indeed, if this were otherwise, the last day, on which rent is almost uniformly made payable, would be posterior to the lease. We think therefore that both rules must be discharged.

Rule discharged.

SWANWICK and Another against SOTHERN and Others.—p. 895.

On a contract for the sale of goods lying in a warehouse, the handing of a delivery order to the vendee, and transfer of the goods to him in the warehouseman's bond, will not vest the property in him, if something remains to be done for the purpose of ascertaining the identity or quantity of the goods; as the weighing of an article forming part of a bulk, and sold by weight.

But, if the identity and quantity are ascertained, as where the oats in a particular bin, which contains nothing else, are sold, and a bill accepted at the same time for the price, the property vests, and the vendor cannot afterwards stop in transitu. Although the delivery order describes the goods by the weight as well as the bin ("1028 bushels of oats in bin 40,") and directs the warehouseman to weigh them over.

TROVER for 1028 bushels of oats. Pleas. 1. Not Guilty. 2. That the oats were not the property of the plaintiffs in manner and form, &c. Issues thereon. On the trial before PATTESON, J., at the Liverpool Spring assizes, 1837, the material facts appeared to be as follows. The plaintiffs were corn-dealers at Manchester; the defendants carried on the business of wharfingers at the Duke's Quay, in the same town. The oats in question, being in a warehouse of the defendants, were sold by Turner and Co., (a) the owners, to John Marsden, and the following delivery order given, addressed to the warehouse keeper.

"Mr. Wm. Eaton, Duke's Quay,

"Deliver Mr. John Marsden 1028 $\frac{1}{4}$ bushel oats, bin 40. O. W., and you will please weigh them over and charge us the expense.

Oct. 3d, 1836.

Joseph Turner and Co.

The warehouse keeper entered this order in his book: and on October 5th he received the following order from John Marsden.

"Mr. Wm. Eaton, Duke's Quay.

"Deliver Messrs. Swanwick and Hall 1028 $\frac{1}{4}$ bushel oats in bin 40. O. Warehouse; and let them be weighed over and send a note up: I will see it paid.

"Fr. and Jno. Marsden,

"Manchester, 5th Oct. 1836."

Swanwick and Hall, the plaintiffs, accepted a bill drawn, by Marsden, October 7th, 1836, for the value of the oats, which was duly honoured. Eaton entered the order of October 5th in his book, and said to the party delivering it, that all would be right, and he would attend to the order. The oats were transferred to the plaintiffs in the defendants' books, but without weighing over. There were no oats in bin 40 but the quantity mentioned in the order. Eaton stated, at the trial, that from the 5th to the 12th of October the oats would have been delivered to the plaintiffs if required. Marsden becoming insolvent, Turner, on October 12th, gave the defendants notice not to part with the oats; and, on the 14th, the defendants gave them up to Turner on an indemnity. At that time, and not before, they were weighed over, and they were found to be two bushels short of the weight mentioned in the orders. It was proved at the trial that the defendants did not consider

(a) The contracts between Turner and Marsden, and Marsden and the plaintiffs, were referred to in the ensuing argument; but their terms were not stated to the Court. See p. 900, post—VOL. XXXVI.—30

themselves bound to weigh, and were not used to weigh, till delivery, when the grain was weighed to ascertain any loss of quantity. The question was, whether, without weighing, the property was sufficiently transferred to vest in the plaintiffs; or whether, on October 14th, Turner still had a right to stop in transitu. PATTESON, J., thought that, on the above state of facts, the plaintiffs were entitled to recover, but he gave leave to move for a nonsuit; and the plaintiffs had a verdict. In Easter term, 1837, a rule nisi was obtained for a nonsuit or a new trial. In Hilary term, 1839, (b)

Cresswell and *Tomlinson* showed cause. No weighing was necessary, in this case, to vest a right in the plaintiffs; as between them and the defendants, at least, the attornment of the defendants' warehouseman was of itself conclusive: *Stonard v. Dunkin*, 2 Camp. 344; *Harman v. Anderson*, 2 Camp. 243; *Lucas v. Dorrien*, 7 Taunt. 278, (2 E. C. L. R. 105;) *Barton v. Boddington*, 1 Car. & P. 207, (11 E. C. L. R. 369;) *Gosling v. Birnie*, 7 Bing. 339, (20 E. C. L. R. 153;) *Holl v. Griffin*, 10 Bing. 246, (25 E. C. L. R. 118;) which cases agree in principle with *Dixon v. Hamond*, 2 B. & Ald. 310; and *Hawes v. Watson*, 2 B. & C. 540, (9 E. C. L. R. 170.) Even if this had been a question between vendor and vendee, it might be contended, on the authority of *Whitehouse v. Frost*, 12 East, 614, that the transaction here proved made the sale and delivery complete, there being an order for the transfer of a specific quantity of goods, and that order accepted; and, consequently, that no question as to the right of stopping in transitu could any longer arise. And, further, the goods here were transferred as a pledge for a specific sum of money advanced by the plaintiffs; the defendants held the oats in trust for them, and no longer subject to the control of Turner & Co.: *Haille v. Smith*, 1 Bos. & P. 563, recognized in *Patten v. Thompson*, 5 M. & S. 350. *Shepley v. Davis*, 5 Taunt. 617, (1 E. C. L. R. 211,) was cited in moving for the present rule. There ten tons of hemp, in the hands of a wharfinger, were sold, and an order given, directing him to weigh and deliver, and the property was held not to pass before weighing; but the ten tons were part of a larger mass, and weighing was necessary to ascertain what was to be delivered. And in *Hanson v. Meyer*, 6 East, 614, a similar case, also cited in moving, it could not be ascertained, without weighing, what quantity of goods the purchaser was to receive, and for what sum he was to give a bill according to the contract: and therefore weighing was held a condition precedent to the vesting of the property. This view of the case was relied upon in *Hawes v. Watson*, where both *Hanson v. Meyer*, and *Shepley v. Davis* were cited. Here the purchasers contracted for a specific parcel of goods, namely, all the oats which were lying in a certain bin, and gave their acceptance for the price.

Wightman and *W. H. Watson*, *contra*. It is not disputed, on the defendants' part, that, if there had been a general unqualified delivery order, received and accepted by their agent, even without a transfer in their books, Turner & Co. would have lost their property in these goods, and could not have stopped them in transitu. But the order here was, "Deliver to S. and H. 1028 $\frac{1}{4}$ bushels of oats in bin 40, and let them be weighed over and send a note up: I will see it paid." It does not appear that the plaintiffs were bound to take them if they exceeded or fell

short of the bulk contracted for; and weighing was necessary to ascertain whether they did exceed or fall short. They did, in fact, when weighed, fall short of the quantity named. [WILLIAMS, J. Was not the quantity designated by its forming the contents of a particular bin? LITLEDAL, J. If they were to take all that that bin contained, weighing seems to have been immaterial.] The bargain was for $1028\frac{1}{2}$ bushels. It cannot be contended that the purchasers were bound to take the oats, however much they might fall short of that quantity; and, if they might have refused them for deficiency, then weighing was essential to the completion of the sale. [PATTESON, J. Within what time do you say that the weighing must have taken place? None was specified. In *Shepley v. Davis*, a time was pointed out within which the goods must have been weighed and delivered.] Here, either party might, at any time, have required that the oats should be weighed. The case falls within the principle of *Hanson v. Meyer*, 6 East, 614; *Busk v. Davis*, cited in *Shepley v. Davis*, 5 Taunt. 622, note (a), S. C. 2 M. & S. 397; *Shepley v. Davis*, and *Withers v. Lyss*, 4 Camp. 237. Something remained to be done between the vendor and vendee to ascertain what was to be delivered; and therefore there had been no complete transfer. If Turner is divested of his property in the oats, it ought to be in his power to sue Marsden on the contract between them: but the facts would not support an action by Turner against Marsden.

Cur. adv. vult.

LORD DENMAN, C. J., now delivered the judgment of the Court.

The question in this case turns upon the construction of two delivery orders. [His Lordship then read the orders set out, p. 321, *antè*.] The oats were all that were in bin 40. They were transferred to the plaintiffs in the defendants' books, but never weighed over. The plaintiffs had accepted a bill for the price, which they duly honoured. On Marsden's failure, Messieurs Turner sought to stop them; and the only question is, whether weighing over was in this case necessary, in order to vest the property in the plaintiffs and defeat the stoppage in transitu. Neither of the contracts of sale were given in evidence.

The cases on this subject establish the principle that, wherever any thing remains to be done by the seller, which is essential to the completion of the contract, a symbolical delivery by transfer in the wharfinger's books will not defeat the right of stoppage in transitu as between buyer and seller. *Hanson v. Meyer*, 6 East, 614; *Shepley v. Davis*, 5 Taunt. 617, (1 E. C. L. R. 211); *Busk v. Davis*, 2 M. & S. 397, abundantly show this. Therefore, if part of a bulk be sold, so that weighing or separation is necessary to determine the identity or individuality (as Lord ELLENBOROUGH expresses it in *Busk v. Davis*) of the article, or if the whole of a commodity be sold, but weighing is necessary to ascertain the price, because the quantity is unknown, the weighing or measuring must precede the delivery; and the symbolical delivery without such weighing will not be sufficient.

But where the identity of the goods and the quantity are known, the weighing can only be for the satisfaction of the buyer, as was held in *Hammond v. Anderson*, 1 New Rep. 69; and in such case the transfer in the books of the wharfinger is sufficient. We are of opinion that the present case is of the latter description, and that this property passed as between buyer and seller. We have therefore no occasion to res^o

to the doctrine of estoppel, which is strongly enforced in *Hawes v. Watson*, 2 B. & C. 540: but we do not mean, in so saying, to cast any doubt upon the authority of that case. Under these circumstances, the rule for a nonsuit must be discharged.

Rule discharged.

The QUEEN against The Poor Law Commissioners for ENGLAND and WALES.

In the Matter of the STRAND Union.—p. 901.

Where the Poor Law Commissioners, by order under stat. 4 & 5 W. 4, c. 76, s. 26, formed several parishes into a union, but the parishes were not united for the purpose of rating, and one of the parishes, before the issuing of such order, had been governed by a local act, (10 G. 4, c. lxviii.,) which directed that the vestrymen of such parish should assess and lay the poor rates and appoint a collector,

Held, that the Poor Law Commissioners could not, by order made under stat. 4 & 5 W. 1, c. 76, s. 46, direct the appointment of a collector of poor rates to act within such parish.

CHANNELL, in Michaelmas term, 1837, obtained a rule, calling on the Poor Law Commissioners to show cause why a certiorari should not issue to remove into this Court certain orders and regulations made by them, dated March 7th, 1836, directing, among other things, that the guardians of the poor of the Strand Union should (subject to the approbation of the commissioners) appoint a person to perform the duties in the said orders and regulations specified to belong to the office of collector of rates in the several parishes within the said union. The rule was moved for at the instance of Donald Coghill, collector of the poor's rate for the parish of St. Paul, Covent Garden, Middlesex.

The grounds of this application, stated in a notice served on the commissioners, (pursuant to stat. 4 & 5 W. 4, c. 76, s. 106,) were, 1. That the duties of a collector of rates do not come within the description of the objects or purposes for which paid officers are authorized to be appointed under the direction of the commissioners by stat. 4 & 5 W. 4, c. 76, s. 46; and that the appointment of collector of rates is not in any way authorized or directed to be made by that statute. 2. That the right to appoint a collector of the poor's rate in and for St. Paul, Covent Garden, is ascertained and governed, among other things, by a certain act of parliament, &c., (10 G. 4, c. lxviii., local and personal, public,) and that such right is still vested in the vestrymen of the said

(a) Stat. 10 G. 4, c. lxviii., local and personal, public, is entitled "An Act to repeal several acts relating to the parish of St. Paul Covent Garden, in the county of Middlesex; and for making better provision for the regulation of the affairs of the said parish." Sect. 19 enacts, That the vestrymen "may from time to time, at any of their meetings, elect and appoint all such officers, medical and other attendants, servants, and persons, (excepting beadles and watchmen), as they shall think proper for carrying this act into execution; and also may from time to time suspend or displace such officers, medical and other attendants, servants, and persons, (except as aforesaid,) or any of them, and appoint others in the room of those suspended or displaced; and out of the moneys to be received under this act may pay such salaries or allowances to the said officers, medical and other attendants, servants, or other persons, as they shall think reasonable; and the said committee-men shall and they are hereby required to take sufficient security from every treasurer, collector, or other receiver of money, to be appointed under this act, for the faithful execution of his office, and may also take such security from any other officer as they shall think reasonable."

Sect 55 enacts, "That from and after the passing of this act three equal pound rates

parish under the provisions of that act, and the said vestrymen are the only proper persons who ought to appoint such collector in and for the said parish.

It appeared, on affidavit in support of the rule, that after the passing of the above local act, and in pursuance of it, a collector appointed by the vestrymen collected the poor's rate until 25th March, 1836, when, by virtue of a warrant of the commissioners, dated February 22d, 1836, the parish was, with others mentioned in the warrant, formed into a union, called the Strand Union. And that, by orders and regulations of the commissioners, dated 7th March, 1836, addressed to the guardians of the Strand Union, then about to be formed, the commissioners, among other things, directed the guardians to appoint a collector of rates for the parishes within the union. This was done, and the collector proceeded to collect rates in the parish of St. Paul. But the vestrymen of St. Paul, being advised that the commissioners had not, and that they themselves had, jurisdiction to appoint such collector for their parish, appointed Mr. Coghill; and the present application was made in his name, for the purpose of bringing up the said orders and regulations of the commissioners, in order that so much of them as related to the appointment by the guardians of a collector for the parish of St. Paul might be quashed as illegal. In Michaelmas term, 1839,(a)

Sir J. Campbell, Attorney-General, Sir W. W. Follett, Wightman,

shall be laid and assessed by the said vestrymen of the said parish, once or oftener in every year, upon all and every the tenants and occupiers of houses," &c., "and other hereditaments and premises within the said parish, according to the respective annual value thereof: one of such rates, for the maintenance and relief of the poor of the said parish, and for defraying all expenses incident thereto or connected therewith, to be called 'The Poor Rate;' another of such rates, for the support and repair of the church and burial ground of the said parish," &c., "and for payment of the necessary expenses incurred by the churchwardens of the parish in the execution of their offices, to be called 'The Church Rate;' and another of such rates, for defraying the expenses incurred in paving, lighting, watching, cleansing, watering, and otherwise improving the streets," &c., "within the said parish, and all other expenses incident thereto or connected therewith, and for defraying any other expenses necessarily incurred in the execution of this act, and not herein particularly mentioned, to be called 'The Improvement Rate;' such last-mentioned rate not to exceed 3s. in the pound of the yearly value of such houses or other premises."

Sect. 60 enacts, That in case any person charged with any rate under this act shall refuse or neglect to pay, "after demand made by the collector for the time being," it shall be lawful for any justice of the peace for Middlesex, and he is required, to summon every person so charged, and not having paid, "on oath being made before such justice by the collector for the time being of his having attended at the place of abode of such person," to appear, at a time and place, &c., before any justice for the county; and it shall be lawful for any person appointed to collect and receive such rates, or for any person appointed by such summons, to serve such summons, &c., and if the party shall refuse or neglect to attend, or shall attend and not show that he is not chargeable, he shall pay the rate and costs; and in case of default, the justice is required, on proof as in the clause mentioned, to grant a warrant "authorizing and directing such collector or any constable to levy such rate," &c., "by distress," &c. Sect. 61 empowers the collector or collectors to demand and receive the rate forty-five days before the quarter-day on which they would otherwise be payable, and in case of non-payment to enforce the payment as in case of default at the quarter-day. Sect. 62 gives the collector power of recovery by distress in the case of persons beginning to remove, &c., without paying arrears, including the rate for the current quarter. Sect. 63 enacts that, in the case of any person quitting his premises without paying the rates, "it shall be lawful for any person appointed to collect any such rates," by warrant, &c., (he making oath that he suspects such person hath removed his goods,) to distrain and sell the goods of such person in any county, city, or place to which he shall have removed, as if he had continued within the jurisdiction of this act.

(a) November 15th. Before Lord Denman, C. J., Patteson, Williams, and Coleridge, Js.

and *Tomlinson* showed cause. First, if the local act does not prevent, the commissioners might lawfully direct the guardians of the Strand Union to appoint a collector for the parishes of that union, including St. Paul. The power is given by sect. 46 of stat. 4 & 5 W. 4, c. 76, which enacts "That it shall be lawful for the said commissioners, as and when they shall see fit, by order under their hands and seal, to direct the overseers or guardians of any parish or union, or of so many parishes or unions as the said commissioners may in such order specify and declare to be united for the purpose only of appointing and paying officers, to appoint such paid officers with such qualifications as the said commissioners shall think necessary for superintending or assisting in the administration of the relief and employment of the poor, and for the examining and auditing, allowing or disallowing of accounts in such parish or union, or united parishes, and otherwise carrying the provisions of this act into execution." Sect. 169, in explaining the term "officer," expressly mentions a "collector" as comprehended in it; and a collector is a person employed, within the purport of sect. 46, in "superintending or assisting in the administration of the relief" of the poor. The object of sect. 46 was, that the collection of poor rates, which, before the act, was intrusted to overseers or to persons appointed under local acts, might, on the formation of unions, be conducted more uniformly, regularly, and economically. A general control over the management of the poor is given to the commissioners by sects. 15 and 21: it may be exercised for the purpose of forming unions under sect. 26; and the only question here is, whether, having the power to form a union, they have also power to direct the appointment of this description of officer within it. The two sections first cited show that they have; and this construction of the act is confirmed by sect. 48, which empowers the commissioners "as and when they shall think proper, by order under their hands and seal, either upon or without any suggestion or complaint in that behalf from the overseers or guardians of any parish or union, to remove any master of any workhouse, or assistant overseer, or other paid officer of any parish or union whom they shall deem unfit for or incompetent to discharge the duties of any such office, or who shall at any time refuse or wilfully neglect to obey and carry into effect any of the rules, orders, regulations, or by-laws of the said commissioners." And sect. 95 imposes a penalty on any "overseer" or "other officer of any parish or union" who shall wilfully disobey the orders of justices and guardians in carrying the rules, orders, and regulations of the commissioners into execution. Secondly, the commissioners are not precluded from appointing a collector for one parish of a union by the circumstance of that parish having already a local act for the management of its poor. It was held in *Rex v. The Poor Law Commissioners, In the Matter of the Whitechapel Union*, 6 A. & E. 34, (33 E. C. L. R.) that the commissioners might form parishes into a union, although one district of the proposed union had a board established by statute for the government of its poor. It seems clearly to follow that under the same circumstances they may appoint a union collector. It is reasonable, if the power to form a union exists, that the incidents of a union should follow, and that local acts, so far as they are inconsistent with the general arrangement, should be superseded. The legislature cannot have meant that, where the commissioners form a union of parishes, a district of the union should become as it were an

island within it, by means of a local act. The effect of stat. 5 & 6 W. 4, c. 76, s. 46, is, that the power of the overseers to appoint a collector where there is no local act, and that of the vestrymen where there is such an act, must, on direction given by the commissioners, be exercised by the guardians. If the appointments of the union collector and of a collector under the local act be incompatible, the latter must be superseded. But there appears no reason that the union collector, in a case like the present, should not observe the provisions of a local statute, so far as he acts for a district governed by such a statute: or, if there be independent functions which a local collector may exercise, and a union collector cannot, a local collector may, perhaps, continue to be employed in such functions.

Thesiger and Channell, contra. By sect. 19 of the local act, the vestrymen of the parish of St. Paul are empowered to appoint such officers as they shall think proper for carrying that act into execution; to suspend or displace such officers, and to appoint others, and to pay such salaries as they shall think reasonable to the said officers; and they are required to "take sufficient security from every treasurer, collector, or other receiver of money, to be appointed under this act, for the faithful execution of his office." And sect. 55 enacts that certain rates, one of which is the poor rate, shall be assessed once or oftener in every year upon the tenants and occupiers of houses, &c., within the parish, by the said vestrymen. Stat. 4 & 5 W. 4, c. 76, does not give the poor law commissioners any authority for the purpose of assessing rates in parishes not incorporated in unions; and where they cannot control the assessment it is reasonable to conclude that they cannot appoint the collector. The preamble of the act, sect. 1, shows the general intention to have been that the commissioners should manage, not the collection of funds, but the administration of them for the relief of the poor; and the same purpose is clearly disclosed in sect. 15, which serves as a guide to the construction of the whole act on this subject. It is true that sects. 33, 34, 35, enable the guardians of any union, with the approbation of the commissioners, to agree that the parishes of such union shall be considered as one parish for the purposes of settlement and of rating, to ascertain the value of property in the several parishes of the union, and to assess the parishes in respect of such property, for the purpose of rating; and sect. 35 enacts that rates grounded on such assessment shall be made, allowed, published, and recovered in the same manner as poor rates now are. But those are rates to be made by the parishes so united: it does not follow that the commissioners have any power over the rates of a single parish within the union which continues to be governed, as to rating, by a statute of its own; and it would require very strong words in the general act to take the power of appointing a collector from those who continue to levy the rates, and to whom, by the local statute, such collector is to give security. The power given to the commissioners by stat. 4 & 5 W. 4, c. 76, s. 46, as to the appointment of officers, and the security to be taken from them, relates only to such officers as shall be thought necessary "for superintending or assisting in the administration of the relief and employment of the poor," and the other purposes specified in that clause, not for the collection of rates; and, if so, the power of removal given by sect. 48 must have the same limit: the officers whom they may remove must be those whom they have power to appoint. Sect. 109 is relied upon; but the use of an in-

terpretation clause is to explain, not to enact; and the mention of a collector in that clause cannot give to previous sections an effect inconsistent with their own language. No instance can be shown, in stat. 4 & 5 W. 4, c. 76, where authority is given to the commissioners over the assessment of rates in a single parish. Inconveniencies have been suggested as resulting from the exemption of the single parish, which thus, it is said, becomes an insulated district in the union; but if that parish retains the power of assessing its own rates, the authority which it preserves over its collectors will not clash with the general powers exercised over the union. On the other hand, it would be very inconvenient that those who are still to levy the rates should not keep the power of appointing and taking security from the collector, who at present receives under the local act not only the poor rate but the two other rates levied annually under sect. 55. The collector has peculiar and important functions to exercise on behalf of the vestrymen under stat. 10 G. 4, c. lxxviii. Sect. 60 points out very particularly the course to be pursued for recovering rates due under that act, and not paid on demand, in which the collector is made chiefly instrumental; by the same section he is authorized to enforce the process for levying such rates by distress; and by sect. 63 he may do so, in certain cases, even out of the parish. The observation of COLERIDGE, J., in *Rex v. The Poor Law Commissioners, In the Matter of the Parish of St. Pancras*, 6 A. & E. 1, (28 E. C. L. R.,) (a) applies strongly here. "We are dealing with a statute which has reference, not so much to the common law, as to a large number of previous statutes;" "its general intent is in accordance with them, except where it marks out in express language their partial repeal or modification. I find it therefore more difficult to adopt that construction which supposes an intent to repeal them, as to other important but unspecified provisions, by implication." And the language of Lord KENYON, in *Williams v. Prichard*, 4 T. R. 2, there cited, is to a similar effect.

Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the Court. After stating the nature of the application, his Lordship said:

The order was resisted on the part of the vestrymen of St. Paul's Covent Garden, on account of a local act of parliament which gave them power to appoint a collector with certain local privileges. We have entertained considerable doubts upon the subject; and have at length come to the conclusion, upon a collation of the sections of the act of parliament, that the order of the Poor Law Commissioners cannot be sustained. We think that, at least till the union is made perfect for the purpose of rating,^(b) there is no power to require that the guardians shall appoint a collector to act in a separate parish under the circumstances stated. We have thought it right to deliver this opinion as soon as we had completely formed it, on account of the inconvenience alleged to arise from the question remaining undecided.

Rule absolute.^(c)

(a) See p. 8.

(b) See stat. 4 & 5 W. 4, c. 76, s. 84. It was assumed, throughout the argument, that the parishes were not united for the purpose of rating.

(c) See the next case.

The following case, decided in Easter term, 1839, may conveniently be added here.

The QUEEN against The Poor Law Commissioners.

In the Matter of the CAMBRIDGE Union.—p. 911.

Where the Poor Law Commissioners, by order under stat. 4 & 5 W. 4, c. 76, s. 26, form several parishes into a union, but not for the purpose of rating, they cannot, by order under sect. 46, appoint a collector of poor rates for any parish or parishes of such union.

THESIGER moved for a rule to show cause why a certiorari should not issue to bring up, for the purpose of its being quashed, an order of the commissioners, dated November 3d, 1836, requiring the guardians of the poor of the Cambridge Union to appoint a collector or collectors of the poor rates of such of the parishes comprised in the Union as the guardians might deem to require a collector, and report such appointments to the commissioners, that they might approve or disallow the same.^(a) This application was made at the instance of John Glasscock, a rate-payer of St. Andrew the Less, one of the above parishes. The guardians had in December, 1837, appointed one Smith collector for St. Andrew the Less, in obedience to the order; which appointment the commissioners confirmed. Afterwards, (April, 1838,) the inhabitants of that parish in vestry appointed one Brown assistant overseer, under stat. 59 G. 3, c. 12, s. 7, and determined and specified, among the duties to be done by him, that he should collect and receive the poor rates. The appointment was confirmed by two justices. The collector appointed by the commissioners had subsequently resigned; and they were about to appoint another when this application was made. The grounds of motion (stated in a notice to the commissioners, pursuant to stat. 4 & 5 W. 4, c. 76, s. 106) were, that the duties of a collector of rates did not come within the description of the objects or purposes for which stat. 4 & 5 W. 4, c. 76, s. 46, authorizes the commissioners to direct an appointment of paid officers; that the appointment of such collector is not authorized or directed by that statute: and that, the inhabitants in vestry having elected an assistant overseer, and determined and specified that he should receive and collect the poor rates, and two justices having by warrant appointed him assistant overseer for the purposes aforesaid under stat. 59 G. 3, c. 12, the duties of collecting and receiving such rates were now solely vested in him by such appointment and the last-mentioned statute.

Thesiger contended that the powers given to the commissioners by stat. 4 & 5 W. 4, c. 76, s. 15, had relation only to the actual management of the poor, and not to the mode of appointing any particular description of managers; and he cited the judgment of WILLIAMS, J., in *Re v. The Poor Law Commissioners, In the Matter of the Parish of St. Pancras*, 6 A. & E. 15, (33 E. C. L. R.) He further contended that the power of appointing a collector was not given by sect. 46, because that section, while it empowers the commissioners to direct the nomination of paid officers, expressly describes the functions of such officers, which do not include those of a collector: that, although sect. 48 gives the commissioners authority to remove assistant overseers and other paid officers, it leaves the power of appointing successors to "the

(a) See the material parts of the order set out at the end of the case, p. 923, note (a), post.

persons competent in that behalf," that is, the parties, whoever they may have been, who appointed the displaced officer: that *Regina v. The Poor Law Commissioners, In the Matter of the Strand Union*, ante, p. 901, was a case directly applicable, the appointment of an assistant overseer under stat. 59 G. 3, c. 12, being equivalent to the appointment of a collector under a local act, which, in that case, was held not to be superseded: that the present case might have been different if the parishes of the union had been united for the purposes of rating, but that had not been done; (a) and that, in reason, the persons who laid the rate were the proper parties to appoint the collector.

The Court granted a rule nisi, against which

Sir *J. Campbell*, Attorney-General, *Kelly*, and *Tomlinson*, showed cause in the first instance. (b) The last cited case does not apply, because the decision there turned upon a local act giving peculiar powers, which, in the opinion of the Court, could not be taken away without an express enactment. The system established by the present order is convenient, and not liable to objection. The collector is to get in all moneys payable on account of the poor rates, or as rents, or arising from any of the sources of income set forth in another order of the commissioners; and to pay over to the treasurer of the union, to be placed to the account of the churchwardens and overseers of the parishes respectively, the moneys collected on behalf of such parishes. [COLERIDGE, J. How are the guardians to appoint a collector to get in the whole fund, when they are entitled only to a part of it?] He is to pay over the money to the treasurer. The treasurer, quoad hoc, is the officer of the churchwardens and overseers. [PATTESON, J. He is not under their control.] He is to place the moneys received to their credit, and to pay on their account all checks and drafts signed by them; and the moneys paid to their credit are to be applied to the same purposes as if collected by them. [PATTESON, J. If they do not choose to have him for their servant, can the commissioners make him so notwithstanding?] COLERIDGE, J. The order says that he is to pay the moneys collected on behalf of the parishes to the account of the churchwardens and overseers. What account is that?] The guardians are made bankers to the union; and these funds are like a separate account at the bank in their name. The treasurer would be answerable to them for the funds being regularly placed to account. [PATTESON, J. I do not see that anything in the act makes him so. COLERIDGE, J. Suppose the overseers want the money for the county rate, and the guardians for the poor rate; whom is the treasurer to obey?] This line of objection applies to the duties of the collector, not the appointment itself; and the notice given under sect. 106 does not apprise the commissioners of it. And, if it prevailed, it would only set aside part of the order. [PATTESON, J. The objections serve to test the general validity of the order.] The words of sect. 46, describing the purposes for which the commissioners may direct officers to be appointed, are very large: "for superintending or assisting in the administration of the relief and employment of the poor, and for the examining and auditing, allowing or disallowing of accounts in such parish or union, or united parishes, and otherwise carrying the provisions of this act into execution." [PATTESON, J. Is collecting the rate administering relief and employment?] The term "administration" of relief can not be confined to the act of delivering supplies to the poor. The

(a) It was taken as conceded that the parishes were not so united.

(b) See stat. 4 & 5 W. 4, c. 76, s. 106.

master of a workhouse is clearly within the intention of the clause; yet, though he contracts for the supplies, he does not, strictly speaking, administer them. On a narrow interpretation of the words, the commissioners could not direct that a clerk to the guardians should be appointed. At any rate, the words "otherwise carrying the provisions of this act into execution" will include the duties of a collector. [PATTERSON, J. Is there any provision in the whole act, which has to do with the collecting of rates?] No direct provision; but if a control over the collectors be necessary to a due administration of the authority conferred on the guardians the act must be taken to confer it.

It seems evident that stat. 4 & 5 W. 4, c. 76, s. 46, was intended, where its powers should be exercised, to repeal stat. 59 G. 3, c. 12, s. 7, as to the appointment of assistant overseers; and if the legislature intended, in those cases, to give the power of appointing assistant overseers to the guardians, under the direction of the commissioners, it may be concluded that the same was meant as to collectors. The words of stat. 4 & 5 W. 4, c. 76, s. 46, are extensive enough, if stat. 59 G. 3, c. 12, s. 7, did not exist, to warrant the commissioners in directing the appointment of an assistant overseer; for he would be a person "assisting in the administration of the relief and employment of the poor." But, the provisions of stat. 59 G. 3, c. 12, s. 7, being applicable only to single parishes, it was contemplated by the later act that the commissioners should direct the appointment of assistant overseers for parishes or unions, the appointment being in the latter case in the guardians. By sect. 48 of stat. 4 & 5 W. 4, c. 76, the commissioners are empowered to remove paid officers of any parish or union, among whom the assistant overseer is specifically mentioned: and likewise "to require from time to time the persons competent in that behalf to appoint a fit and proper person" in the room of such officer. Now such appointment, in the case of an assistant overseer, cannot be an appointment in pursuance of stat. 59 G. 3, c. 12, s. 7, because the nomination and election of such overseer are voluntary acts. The compulsory appointment mentioned in the 48th section of 4 & 5 W. 4, c. 76, can only be an appointment under sect. 46 of that statute, and by the persons there named. The power to remove an assistant overseer, which is given in terms by sect. 48, implies a power to direct the appointment of such an officer under the 46th section. And if the guardians, directed by the commissioners, may originally appoint an assistant overseer under sect. 46 for a parish, or union, they may also, under the same clause, order that part of the duty of an assistant overseer which relates to the collection of rates, and no other, to be performed by an assistant overseer for an assigned district, which would be in effect to order the appointment of a collector. [COLERIDGE, J. Supposing that the commissioners may direct an assistant overseer to be appointed, his functions would be such only as might be specified in his warrant.] If he had been originally appointed to perform all the usual functions of an overseer, the commissioners, under sect. 48, might order him to be re-appointed for those purposes. [COLERIDGE, J. If he were re-appointed for the purpose of collecting poor-rates, the question would still be whether that was a purpose for which they might direct an officer to be appointed under sect. 46.] The meaning given to "officer" in the interpretation clause, s. 109, supports the construction adopted by the commissioners. [PATTERSON, J. Such clauses generally make more confusion than they prevent. But this interpretation would be satisfied by confining the term "cc"

lector" to the case of parishes united for the purpose of rating.] The primary object of this statute undoubtedly was the administration of relief; but it also provides for matters of fiscal regulation, as in sects. 21, 23, 24, 25, 35, 47. And sect. 46 empowers the commissioners to determine "the amount and nature of the security to be given by such of the said officers" appointed under that section, as they shall think ought to give security. [PATTESON, J. If the guardians appoint a collector under this section, they will take security for duties which are to be discharged, not to them, but to other persons.] The treasurer would be the proper obligee; and, if a penalty were recovered, he would hold the money in trust.

Thesiger, (with whom was *Channell*,) contra, was stopped by the Court.

LORD DENMAN, C. J. This case is very clear. When a similar motion was before us in *Regina v. The Poor Law Commissioners, In the Matter of the Strand Union*, ante, p. 901, we looked minutely into the case with reference to this point. The words of stat. 4 & 5 W. 4, c. 76, s. 46, are not sufficient to give the authority contended for. The power which that section confers on the commissioners in general terms, "to direct the overseers or guardians of any parish or union, or of so many parishes or unions as the said commissioners may in such order specify and declare to be united for the purpose only of appointing and paying officers, to appoint such paid officers," is restricted by the words which follow, "with such qualifications as the said commissioners shall think necessary," not for the general administration of the poor law, but "for superintending or assisting in the administration of the relief and employment of the poor, and for the examining and auditing, allowing or disallowing of accounts in such parish or union, or united parishes, and otherwise carrying the provisions of this act into execution." This specification, following the more general words, binds down the commissioners, in ordering an appointment, to the purposes particularly mentioned. The act does not anywhere refer to the collection of rates; and by the true rules of construction the term "officers," in sect. 46, must be confined to those whose functions are of the kind there pointed out. The argument on the mention of assistant-overseers in sect. 48 is an ingenious attempt to suggest something which the legislature has not thought proper to enact.

LITLEDAL, J. The words "paid officers," in sect. 46, might include collectors; but we cannot say that it does so, if (as the fact is) the word "collector" nowhere occurs in the act, and the functions of a collector are not necessary for the purposes mentioned in sect. 46. And they are not necessary for "superintending or assisting in the administration of the relief and employment of the poor," or for the "examining and auditing, allowing or disallowing of accounts" in the parish or union. If the parishes had been united for the purpose of rating, the section might perhaps have applied; but that is not the case. In the interpretation clause, sect. 109, "officer" is said to mean "collector;" but it does not follow that a collector is one of those officers whose appointment the commissioners have a general power to direct for the purposes of this act. In statutes where the legislature has intended to provide for the collecting of rates, express enactments have been introduced on that subject, as in stat. 22 G. 3, c. 83, (a) and the St. Paul's Covent Garden act, 10 G. 4, c. lxxviii. (b)

(a) Sect. 7.

(b) Ante, p. 902, note (a).

PATTESON, J. The Cambridge Union is evidently constituted under the 26th section of stat. 4 & 5 W. 4, c. 76, and under that only. It is not an union for purposes of settlement under sect. 33, nor for purposes of rating under sect. 34, nor for the purpose only of appointing and paying officers declared to be so by the order in question, under the 46th section, which latter sort of union, however, I am unable to comprehend. Taking it then to be an union under sect. 26, the latter words of that section will be found to be very material: "but, notwithstanding such union and classification, each of the said parishes shall be separately chargeable with and liable to defray the expense of its own poor, whether relieved in or out of any such work-house:" for it shows that the funds of one parish are in no way mixed with those of another by reason of their forming part of the same union. The 15th section is relied on by the commissioners, as showing that the administration of relief to the poor, according to the existing laws, is to be in all cases subject to their direction and control. No doubt that is so; but it is remarkable that that section enumerates very many matters, in respect of which the commissioners are to make rules, orders, and regulations, amongst which matters the poor rates are not mentioned; and throughout the act no authority whatever is given to the commissioners or to the guardians of any union to interfere with the making or collecting the poor rates in any parish. There is not, indeed, so far as I have been able to find, any express exception in that respect, as there is in stat. 22 G. 3, c. 83, commonly called Gilbert's act, which (sect. 7) prevented the guardians there mentioned from interfering in the collection of poor's rates; but there is a total omission of any enactments respecting those rates, which cannot have been accidental. I think, therefore, that the legislature intended to leave this matter as it stood before. The arguments urged to the contrary go too far; for, if the commissioners might direct the guardians to appoint a collector, I do not see why they might not also direct them to appoint persons who should assess the parishes, though not united for the purpose of rating. The 21st section is also referred to as containing general powers; but on examination it will be found to relate only to workhouses. The 48th section is also referred to, which gives power to the commissioners to remove any paid officer of any parish whom they shall deem unfit for, or incompetent to discharge, the duties of his office, and to require from time to time the *persons competent in that behalf* to appoint a fit and proper person in his room. No doubt can be entertained as to the power of the commissioners to remove the collector of St. Andrew the Less under that section, if they deemed him unfit or incompetent; but it is not suggested that this order proceeds on any such ground; and, if it did, it is equally clear to my apprehension that they must require a fit and proper person to be appointed in his room by the persons competent in that behalf; and that the competent persons to appoint under that section are plainly those who made the original appointment, that is, the parishioners, and not the guardians of the union. If this be not so, the commissioners need only remove an officer, to change the persons who are to make the appointment. The 48th section has therefore no bearing at all upon the present question.

We come then to the 46th section, under which this order is evidently made, and upon the construction of which its validity must after all depend. That section empowers the commissioners to direct overseers or guardians of any parish or union to appoint paid officers. Had i

clause merely authorized them to give such direction, without specifying any purposes for which the appointments should be made, the case would have been different. But the purposes are pointed out; and we cannot stretch the enacting words. The appointment of officers is to be for certain purposes. First, "for superintending or assisting in the administration of the relief and employment of the poor." Collecting the rates does not come under that head; it would be an abuse of language to say so. Secondly, "for the examining and auditing, allowing or disallowing of accounts in such parish or union or united parishes." Collecting the rates does not come under that head. Thirdly, "otherwise carrying the provisions of *this* act into execution." The whole of the case turns upon the meaning of those words. Now these general words, following particular ones, are to be construed with reference to those particular ones, and to be applied only to things ejusdem generis, as is usually the case. And it seems to me clear that they cannot be applied to the collecting of the poor rates. That collection is not and cannot be made under the provisions of *this* act. This act contains no provisions whatever applicable to the collection of the poor rate: it omits, as I have before observed, and I should say studiously omits, all such provisions: the collection is and must be made under the former existing acts. It seems to me that the collection of the poor rate under the general laws cannot be said to be in any shape carrying the provisions of *this* act into execution; and consequently that the appointment of a paid officer to make such collection was not within the powers conferred by the 46th section. If the union were one for the purpose of rating, the case would be different, because the rate to be collected would then be a rate for the whole union, and made under this act; for it could not be made otherwise than under the act. And such a case is sufficient to show that the general words in question have something to operate upon, as well as that part of the interpretation clause, sect. 109, which says that the word "officer" shall include "collector."

For these reasons, I am of opinion that the order cannot be supported, and that this rule must be made absolute.

COLERIDGE, J. We gave much consideration to this point in the case of the Strand Union, though our judgment there was delivered shortly. It is conceded that the power here claimed for the commissioners is not given in direct terms; but it is said that the general scope of the act requires it. There cannot be any safer mode of ascertaining this than to look at sect. 15, which limits and defines the general powers of the commissioners. By that section "the administration of relief to the poor," "according to the existing laws, or such laws as shall be in force at the time being," is made subject to their direction and control. The subject-matter of their functions is the administration of relief, but according to the existing laws. When it is argued that a subsequent clause of the statute repeals stat. 59 G. 3, c. 12, s. 7, by implication, we are met by these words, which show an intention to preserve former enactments; and I should therefore be slow in supposing that the forty-sixth section has the effect which has been ascribed to it. I was struck with the very ingenious argument by which Mr. Tomlinson endeavoured to show, from sect. 48, that sect. 46 was a repeal of the prior statute as to assistant overseers; but the vice of the argument is this: "assistant overseer" may mean many or few things; the officer may have something or nothing to do with collecting rates or with administering relief. All the duties of such an officer are *pro re nata*. If the commissioners

have power to remove an assistant overseer, it does not follow that they could appoint an assistant overseer who is to collect rates. The argument must, then, come back to sect. 46; and on that section it is clear that they have not authority to direct the appointment of an assistant overseer under circumstances like the present.

The present order, therefore, is bad, because it goes beyond the power given to the commissioners by stat. 4 & 5 W. 4, c. 76.

Rule absolute.(a)

(a) The order of the commissioners was set forth on affidavit; and the Attorney-General stated, in the course of argument, that a similar order had been sent to most of the unions formed by the commissioners.

"Cambridge Union. Know all men," &c., "that we, the Poor Law Commissioners," &c., "in pursuance and execution of the powers and authorities vested in us under and by virtue of the statute," &c., (4 & 5 W. 4, c. 76,) "do hereby order and direct, That the guardians of the Cambridge Union shall, within one month from the date of this order, appoint one or more fit and proper persons to be the collector or collectors of the poor rates of such of the several parishes comprised therein as the said guardians may deem to require a collector, and shall, as soon as conveniently may be after such appointments, report the same to us the said Poor Law Commissioners, in order that we may approve or disallow the same, or give such other directions thereon as the case may require. And in case and so often as any person so appointed shall die or resign, or be removed, the said board of guardians shall, as soon as conveniently may be after such death, resignation, or removal, proceed in like manner to a new appointment." (Then followed a regulation for the payment of such collector by poundage.)

"And we do hereby further order and direct that the following shall be the duties of such collectors.

"1. To assist the churchwardens and overseers of the several parishes comprised within the said union for which they shall be respectively appointed collectors, in making up the assessments, filling up receipts, keeping all books, and making all returns, which relate to the collection of rates, rents, or other moneys payable on account of the poor:

"2. To collect all moneys payable on account of the poor rates, or as rents, or arising from any of the sources of income of such parishes as aforesaid, set forth in our order for keeping the books of receipts and payments.

"3. To pay over weekly, or oftener if required, and whenever the sum in their hands shall amount to 50*l.*, to the treasurer of the union, to be placed to the account of the churchwardens and overseers of such parishes respectively, the moneys collected on behalf of such parishes respectively, but to make no other payment or disbursement whatsoever.

"4. At all times when required by the churchwardens and overseers of such parishes respectively, to produce the rate-books and other account-books in their custody relating to such parishes, and balance the said rates, and to furnish the said churchwardens and overseers respectively with a true list of all defaulters in the payment of rates and other dues to such parishes, and, under the direction of the guardians, to institute and attend to proceedings against such defaulters.

"5. To attend, when required, the meetings of the board of guardians, with the several receipt check-books, and the rate-book in collection, and when and as soon as any rate-book is closed, to hand over the same to the clerk, and all the receipt-books belonging thereto, and generally to observe and fulfil all lawful orders and directions of the said board of guardians, and likewise the rules, orders, and regulations relating to the said union already or to be hereafter issued by the Poor Law Commissioners for England and Wales.

"And we do hereby further order and direct, That the persons so to be appointed as aforesaid shall, before they enter on the performance of the duties of their office, give such security for the due and proper discharge of the same as shall appear to the said guardians to be necessary and fitting.

"And we do hereby further order and direct, That the treasurer of the said union shall receive all moneys tendered to be paid to the churchwardens and overseers of any parish in the said union for which a collector or collectors shall be appointed under this order, and shall place the moneys so paid to the credit of the churchwardens and overseers.

"And that the said treasurer shall pay and satisfy out of any moneys for the time being in his hands, on account of the churchwardens and overseers of any such parishes as aforesaid, all checks and drafts signed by the majority of the churchwardens and overseers of such parish.

"And we do hereby further order and declare, That the said moneys so paid to the credit of the churchwardens and overseers of any such parish as aforesaid shall be applied to such and the same purposes as the same would by law have been applicable to in case the same had been collected by the churchwardens and overseers.

"And we do hereby further order, That if the guardians shall deem that any one or

more of the said parishes shall require such services as are usually performed by an assistant overseer, they may appoint the person so appointed as collector for such parish or parishes to perform the duties of an assistant overseer for such parish or parishes accordingly. Provided always, and we do hereby order, direct, and declare, that those parishes in which either of the churchwardens or overseers is willing and desirous to collect the rates shall not be deemed to require a collector."

(Then followed regulations for the churchwardens and overseers in parishes not deemed to require a collector.)

See stat. 2 & 3 Vict. c. 84, s. 2, giving validity to orders made by the Commissioners before 26th August, 1839, (and not rescinded or quashed before 6th May, 1839,) for the appointment of collectors by overseers or guardians.

HEMMING against TRENERy and MALIM.—p. 926.

Assumpsit on a written guarantee, set forth in the declaration. Plea, Non Assumpsit. On the trial, the instrument appeared to have been interlined, so as materially to alter its effect; but, without the interlining, it corresponded to the declaration. The jury found that the interlineation was made after the instrument was executed.

Held, that plaintiff was entitled to the verdict, whether or not he was privy to the alteration; the effect of the alteration, if any, being only to discharge or modify the original contract, and therefore constituting a defence which required to be shown by way of confession and avoidance.

ASSUMPSIT. The declaration stated that, whereas, before the making of the promise, &c., next mentioned, to wit, 21st August, 1833, defendants were sureties for the due performance of certain contracts for the building of certain works by one Robert Streather within a certain limited time, to wit, within three months from the day aforesaid, and, it being then necessary that defendants, or R. S., or some or one of them, should procure bricks for the building of the said works, and plaintiff being then a maker and seller of bricks, defendants, well knowing the same, then wrote and delivered unto plaintiff the following order in writing; viz., "Mr. H. K. Hemming. Please to deliver to Mr. Robert Streather, for the completion of his contracts at Deptford and Woolwich yards, 500,000 best stock bricks, to be delivered at the said dock-yards at 32s. per thousand; and we, as his sureties, do hereby consent that the proper officer, Navy Office, Somerset House, who shall or may have the payment of the contract when finished, shall and may stop the amount of such account for bricks delivered, and we do hereby agree to become guarantees *for the payment of the same*. Dated this 21st day of August, 1833:" which said order being so delivered to plaintiff, plaintiff then agreed with defendants to deliver the said bricks accordingly, and, in consideration that plaintiff would deliver to R. S. at the dock-yards, &c., defendants undertook and promised plaintiff to guarantee the payment of the same to him within a reasonable time after the same should be so delivered as aforesaid: averment that plaintiff, confiding, &c., did afterwards, to wit, on, &c., deliver to R. S., at the dock-yards, 500,000 best, &c., at the rate of, &c., amounting in the whole to a large sum, &c., viz. 800*l.*; and, although a reasonable time for the payment of the same hath long elapsed since the delivery of the said bricks as aforesaid, R. S., (although often requested,) hath not paid the said sum, &c., whereof defendants then had notice: breach, that defendants have not paid plaintiff the said sum, &c., although often requested; and the said sum remains wholly due, &c.

There was a second count, setting out a similar instrument, except that the concluding words of it were stated to be, "for the payment of the same to you when the amount of the contract is paid." Dated," &c.; and the latter part of the count was modified to suit the instrument as last set out.

The defendants pleaded, severally, Non Assumpsit to the whole; and various special pleas to the second count, some of which were demurred to, and others led to issues of fact.

On the trial before Lord DENMAN, C. J., at the sittings at Westminster after Trinity term, 1836, the plaintiff put in an instrument, signed by Streather and the defendants as his sureties, which appeared to have been interlined. Without the interlineation, the instrument corresponded to that set forth in the first count; with the interlineation, to that set forth in the second. Conflicting evidence was given as to the circumstances under which the interlineation had been made, and upon the general facts of the case, which are not material to the point here decided. (a) The Lord Chief Justice directed the jury to find for the plaintiff as to the first count, and for the defendants as to the second, on the pleas of non assumpsit, if they believed that the interlineation was made after the execution of the instrument by the parties; but, if they believed it to have been made before the execution, then, on these pleas, for the defendants as to the first count, and for the plaintiff as to the second. Verdict for the plaintiff as to so much of the pleas of non assumpsit as related to the first count; for the defendants as to so much of these pleas as related to the second count; for the plaintiff on all the other issues of fact.

In Michaelmas term, 1836, Sir W. W. Follett obtained a rule nisi for a nonsuit or new trial, on the grounds, first, that, if the plaintiff was privy to the alteration even after the execution, he could not recover on the first count; secondly, that the verdict was against the weight of evidence. In Hilary term, 1838, (b)

Sir J. Campbell, Attorney-General, and Archbold, showed cause. It is immaterial whether the alteration did or did not vitiate the instrument, since, by the finding of the jury, it once existed as a good contract: for supposing the instrument vitiated by subsequent alteration, the objection cannot be taken upon Non Assumpsit. By R. Hil. 4 W. 4, *Pleadings in Particular Actions*, I. 1, that plea is to "operate only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law;" and, by I. 3, "all matters in confession and avoidance, including not only those by way of discharge, but those which show the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded." Cases decided before the new rules are inapplicable. Such is *Powell v. Divett*, 15 East, 29, where the plaintiff was held to be rightly non-suited on the ground that the instrument declared upon had been by his consent altered after being completed. Then a plea of non assumpsit raised the whole question. At present, the only question on such a plea is whether there was once a good contract, as found by the jury. A statutable illegality in the original contract must be pleaded, if a contract good at common law appear on the declaration; *Barnett v. Glossop*, 1 New

(a) As to the history of the transaction, see the judgment, post, p. 326.

(b) January 23d. Before Lord Denman, C. J., Littledale, Williams, and Coleridge, J.

Ca. 633, (27 E. C. L. R. 522 :) and so must even a common law illegality, according to *Potts v. Sparrow*, 1 New Ca. 594, (27 E. C. L. R. 502.) The evidence here rather shows that the alteration was made by a stranger without authority ; which, as Lord ELLENBOROUGH expresses himself in *Henfree v. Bromley*, 6 East, 309, is "a mere spoliation," and would not affect existing rights. [The argument on the evidence is omitted.] The decision in the Exchequer, *Hemming v. Trener*, 2 C. M. & R. 385, S. C. 5 Tyrwh. 887, is inapplicable : there the plaintiff declared on the instrument in the altered form.

Sir *W. W. Follett*, contra. When the instrument was produced, apparently altered from its original state as described in the first count, it was for the plaintiff to show under what circumstances the alteration took place. (a) It was not enough to show that it was executed by both parties before the alteration. If the plaintiff afterwards altered it without the consent of the defendant, the whole contract was vitiated ; if it was altered by mutual consent, the altered contract was substituted for the original one. In either case the contract existing between the parties was not that declared upon ; and the plaintiff fails upon the issue on non assumpsit. "If a deed after execution be altered in a material place by rasure, interlineation, addition, &c., by the obligee himself, it shall be void ; and the obligor may plead *non est factum* ;" Com. Dig. *Fail*, (F 1.) And so it was said by the Court in *Cospey v. Turner*, Cro. Eliz. 800. Even if it be done for the benefit of the obligor, the deed is avoided : nor would the old deed remain good though the obligor assented ; *Markham v. Gonaston*, Cro. Eliz. 626 ; *Powell v. Divett*, 15 East, 29 ; *Downes v. Richardson*, 5 B. & Ald. 674, (7 E. C. L. R. 227 ;) *Bowman v. Nichol*, 5 T. R. 537, are authorities for the defendant in this case. *Burnett v. Glossop*, and *Potts v. Sparrow*, cannot be maintained ; *Johnson v. Dodgson*, 2 M. & W. 653, is the other way. [COLERIDGE, J. Those cases might be bad law, and yet the argument for the plaintiff here good : for the argument is that there was once a good instrument, which is declared on : in those cases the defence went to show that the contracts were void ab initio. Lord DENMAN, C. J. The judges have never doubted that, in an action for slander, the defendant may show a privileged communication under the general issue.] (b) The plaintiff himself here puts in a contract different from that on which he declares. The effect of the whole might be, and, upon the evidence appears to have been, that there was no contract at all up to the time of the alteration, but that the whole was in *feri*. The evidence clearly shows the plaintiff's knowledge of the alteration. [The argument as to this is omitted.] The case is the stronger, because the Court appears to have exceeded its jurisdiction in allowing the two counts ; and, if the plaintiff has been confined to the second, there was a good answer, as appears from the case in the Exchequer, *Hemming v. Trener*, 2 C. M. & R. 385, S. C. 5 Tyrwh. 887. And this shows the materiality of the alteration.

Cur. adv. vult.

Lord DENMAN, C. J., now delivered the judgment of the Court.

It appears that Streather had contracted to do certain works for government, and that the plaintiff, who was a manufacturer of bricks,

(a) See *Knight v. Clement*, 8 A. & E. 215.

(b) See the cases collected in *Lillie v. Price*, 5 A. & E. 645, (31 E. C. L. R. 404.) And see *Hayfield v. Staff*, 5 A. & E. 153, (31 E. C. L. R. 307.)

engaged to supply a certain quantity of bricks to Streather, to assist him in the completion of the works, if the defendants would guarantee the payment for them under the terms agreed upon. An agreement in writing, containing the guarantee, was entered into and signed by the plaintiff and the defendants: the bricks were supplied by the plaintiff; but Streather did not pay him for them; and he therefore applied to the defendants, as the sureties, for payment; but they objected to pay, for the reasons given at the trial of the cause, but which it is not now material to advert to; and the plaintiff, on that refusal, brought the present action.

The contract of guarantee, which was given in evidence at the trial, was, in fact, interlined; and that interlineation stated a condition that the guarantee should only attach and be binding when the amount of the contract was paid to Streather. This condition, therefore, limited the responsibility of the defendants, and was for their benefit.

An action had been brought in the Exchequer on the contract as interlined; and that Court was of opinion (*Hemming v. Trenery*, 2 C. M. & R. 385, S. C. 5 Tyrwh. 887,) that the amount of the contract had not been paid to Streather, and that, consequently, the condition on which the guarantee was to attach had not arisen, and that the plaintiff was not entitled to recover.

The plaintiff has now brought an action in this Court: and he has two counts in the declaration; the first on the contract without the interlineation, treating the guarantee as an absolute guarantee; and the second count on the contract with the qualification in the condition.

The defendants have separately pleaded non assumpsit to the whole declaration, and also some special pleas which appear to apply to the last count only. The jury have found a verdict for the plaintiff on the non assumpsit to the first count, and for the defendants on the non assumpsit to the second count: and they have found for the plaintiff on all the special pleas; which last finding, however, is immaterial on the present inquiry. The counsel for the defendants have applied for leave to enter a nonsuit or for a new trial. As to the nonsuit, no leave appears to have been given; and indeed it is abandoned. As to a new trial, it is moved for as a verdict against evidence, and for a misdirection.

The case, in the result, turns out to be thus. A contract is adduced in evidence, with an interlineation: if that interlineation was there before it was executed by the parties, that of course is the existing contract, and always was so; and, if such was the state of things, the plaintiff cannot recover. The Court of Exchequer have decided against him as to the law arising out of such a contract; and the jury have on this trial negatived the existence in fact of such a contract. But the jury have affirmed the existence of a contract without the interlineation. Now, if the contract without the interlineation was signed by the plaintiff and defendants, it was then the actual existing contract of the parties, and would support the finding of the jury on the non assumpsit to the first count; but, as to the evidence of this being so, one witness for the plaintiff states it, but two witnesses for the defendants state that the interlineation was made at the time it was written out, and before it was signed by the parties. It was therefore a question for the jury to which of the witnesses they would give credit. Supposing the witness for the plaintiff was believed, and that the jury had come to the right conclusion as to the fact, that the contract had been executed by both parties without the interlineation, and that it did really once exist as

such a contract, yet, as it was exhibited to the jury with the interlineation, and therefore in an altered state from the original contract, the defendants contend that it ought to have been left to the jury to say by whom the alteration was made. 1st, Whether by consent of both parties; 2dly, Whether by the plaintiff; 3dly, Whether by the defendant; 4thly, Whether by strangers, i. e. by persons who took a part in these matters, and who might think that the agreement with the interlineation was what ought to bind the parties.

As to the first, if it was altered with the consent of both parties, the altered agreement would bind them, but would put an end to the original contract as in the first count. As to the second, if the alteration was made by the plaintiff without the consent of the defendants, (though for their benefit,) it would, according to the authorities cited, put an end to the original agreement. As to the third, if it was altered by the defendants without the consent of the plaintiff, it would have no effect, and would remain as it was originally. As to the fourth, if the alteration was not by the privity of the parties, it is not material to consider the general rules at present.

But, supposing the agreement to be vitiated by an interlineation, then comes the question, whether this is open under the new rules upon non assumpsit. For there was once a valid contract, which is avoided by some subsequent act; and therefore the question arises, whether it should not be pleaded. Here nothing was adduced to show that the original contract was void in its inception. The issue was joined on the fact of its being executed. Now it was proved to have been executed. It was produced, indeed, at the trial, bearing on its face an alteration, which must have been made or sanctioned by the plaintiff; but that had been made after the execution. The promise, then, which the defendant denied, was established by the evidence; and, if he had the means of defending himself, it was by matter *ex post facto*.

The rule of Hilary term, 4 W. 4, as to this, is, "In every species of assumpsit, all matters in confession and avoidance, including not only those by way of discharge, but those which show the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded;" *Pleadings in Particular Actions*, l. 3, 5 B. & Ad. viii.

It appears to us that the defence arising from the alteration of the contract falls within the meaning of confessing and avoiding; for the defendant, on such a defence, confesses that he made the contract, but he avoids it by showing that the contract was afterwards avoided by the alteration. This defence by confession and avoidance arises from matter of fact only, and operates as a discharge from the contract, rather than as showing the transaction to be either void or voidable in point of law; because the transaction itself, which is the original, was neither void nor voidable in point of law. This we mention, because, if it operates as a discharge, it becomes unnecessary to consider the effect of the rule as to defences which arise as to matters of law, upon some of which a difference of opinion seems to be entertained by different judges, whether such defences may be set up on the general issue, or whether they must be pleaded, and as to which we may refer to the cases of *Barnett v. Glossop*, 3 Dowl. Pr. C. 625, S. C. 1 New Ca. 633, (27 E. C. L. R. 522;) *Potts v. Sparrow*, 3 Dowl. Pr. C. 630, S. C. .

New Ca. 594, (27 E. C. L. R. 502,) and *Johnson v. Dodgson*, 2 M. & W. 653.

But the Court was supposed to have assumed an extraordinary power in permitting several counts on the two inconsistent contracts; and the plaintiff to have taken a fraudulent advantage of that power by declaring in this Court on the general contract, after proceeding on the conditional one in the Exchequer. For our own part, we do not repeat the reasons that induced us to permit the insertion of two counts; but it is fair to remark that there is no censure applicable to the plaintiff for claiming under both contracts, which will not equally attach on the defendants for denying both; and, the execution of the former having been proved to the satisfaction of the jury, justice would have been defeated by a mere technicality if the defence had succeeded by proof that the plaintiff had contemplated the introduction of some alteration in the contract, with a view to make it more favourable for the defendant.

Rule discharged.

IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

DOE on the several demises of SPILSBURY and Another against Sir FRANCIS BURDETT, Baronet, and Others.

DOE on the same demises against SKYNNER and Others.—p. 936.

Lands were limited to such uses, &c., as L. should appoint by her last will and testament in writing, to be by her *signed, sealed, and published in the presence of, and attested by, three or more credible witnesses*. L. signed and sealed an instrument (before stat. 7 W. 4, and 1 Vict. c. 26) containing an appointment, commencing thus:—"I, L., do publish and declare this to be my last will and testament;" and ending thus:—"I declare this only to be my last will and testament. In witness whereof I have to this my last will and testament set my hand and seal, the 12th day, &c." The attestation was as follows:—"Witness, C. B., E. B., A. B."

Held, by the Court of Exchequer Chamber, reversing the judgment of the Court of K. B., *per* a good execution of the power.

Per VAUGHAN, J., PARKER, B., ALDERSON, B., and COLTMAN, J. Dissentientibus TINDAL, C. J., BOSANQUET, J., and GURNEY, B.

THESE were actions of ejectment, brought in the Court of King's Bench, the first for lands in Derbyshire, the second for lands in the town and county of Nottingham. On the respective trials, in 1834, before TINDAL, C. J., at the Derbyshire Lent assizes, and LITLEDAL, J., at the Nottingham Lent assizes, verdicts were found for the plaintiffs, subject to the opinion of the Court upon two cases. The Court of King's Bench, in each case, decided (in Michaelmas term, 1835, *Doe dem. Spilsbury v. Sir Francis Burdett*, 4 A. & E. 1, (31 E. C. L. R. 11,)) that a power, set forth in the cases, was well executed by the instrument also set forth in the cases; and, the defendants claiming under the appointments in the instrument, and the lessors of the plaintiffs under interests which were to arise in default of appointment, judgment was given for the defendants. The cases were then turned into special verdicts, the material facts in which were as follows.

signed in their presence, appears also from what was said by Lord ELDON in the case of *M^{rs} Queen v. Furguhur*, 11 Ves. 477. In that case the instrument was required to be signed and sealed in the presence of two or more witnesses. No attestation was required. The deed (as was also the case in *Wright v. Wakeford*, 4 Taunt. 213, purported to be signed, sealed, and executed in the presence of three credible witnesses. The attestation was only *sealed and delivered in the presence of, &c.* Lord ELDON said, upon the question whether, after execution, it ought to be taken that he did sign in the presence of the witnesses attesting the sealing and delivery, "there would be a miscarriage in a Judge, directing a jury, if that fact was found, not to presume that the deed was signed in the presence of the same witnesses, as it professed to be."

The case of *Wright v. Wakeford* was followed by that of *Doe dem. Mansfield v. Peach*, 2 M. & S. 576, which I cite for the distinct enunciation it contains of the principle previously acted on in *Wright v. Wakeford*.

In *Doe dem. Mansfield v. Peach* the appointment was to be by deed or writing under hand and seal, executed in the presence of, and to be attested by, two or more witnesses. The form of attestation was, *sealed and delivered by the said Robert Peach in the presence of Thomas Martin, John Seale*. It was said by the Court, in giving judgment, "It seems to us that to make a due execution of the power, there must be a making of an instrument with all the forms required by the power, and that there must be an attestation of its execution with all those forms. The intention of the parties was, that the attestation should be co-extensive with the things required to be done."

This case has been followed by others in which the same doctrine has prevailed. And it is observable that, although many cases are to be found in our law books where powers had been given to be exercised by writing executed in the presence of and attested by two or more witnesses, in none of them have the instruments been held to be well executed unless the attestation itself either stated in express terms, or showed by equivalent expressions, that the requisite conditions had been complied with; *Doe dem. Hotchkiss v. Pearce*, 6 Taunt. 402, (1 E. C. L. R. 427;) *Wright v. Barlow*, 3 M. & S. 512; *Hougham v. Sandys*, 2 Sim. 95; *Ward v. Swift*, 1 Cr. & M. 171, S. C. 3 Tyrwh. 122; *Curteis v. Kenrick*, 3 M. & W. 461.

It is to be observed, however, that dicta of two learned Judges may be cited as qualifying in some degree the generality of the positions laid down in those cases.

In *Moodie v. Reid*, 7 Taunt. 355, S. C. (in Chanc.) 1 Mad. 516, (2 E. C. L. R. 133,) the appointment was required to be made by deed, or will signed and published in the presence of, and attested by, two or more credible witnesses. The donee of the power made her will concluding in these terms:—*These my last bequaths signed by me this 4th day of February, 1812. Sarah Moodie. Witness, Betty Headington. Jane Headington.* Lord C. J. GIBBS, upon the argument, expressed an opinion that the signing was clearly attested, but seemed to doubt about the publishing. In the result the Court, after taking time to consider, certified the appointment not to be well executed. The reasons do not appear. With reference to the remark of Lord C. J. GIBBS, it may not unreasonably be asked how it appears that the will was signed in the

presence of the witnesses. Does the simple signature by a witness of his name to an instrument import that he saw it signed? Does it import more than that the instrument had been authenticated in his presence, by the party executing it, as a genuine instrument? The authentication may have been simply by an acknowledgment of his signature, which, according to the case of *Jones v. Dale*, 1 Sugd. on Powers, 302, (6th ed.,) is not sufficient; for, as there said by REYNOLDS, J., saying and doing are different things; "and his saying he had writ it himself won't amount to a subscribing in the presence of three witnesses."

The dictum of Lord Chief Justice GIBBS derives some support from what was said by the Vice-Chancellor, Sir JOHN LEACH, in the case of *Stanhope v. Keir*, 2 Sim. & St. 37.

In that case the power was to be executed by will, signed and published in the presence of, and attested by, three or more witnesses. The will concluded as follows:—*This is my last will and testament, made and signed in the year of our Lord 1818, on the 19th day of November, at Gravesend, in the county of Kent.* (Signed) *Eugenia Keir*, (L. S.) *In the presence of C. McDonald Lockhart. Thomas Bennett. Alexander Edwards.* The Vice-Chancellor, Sir JOHN LEACH, said, on this case, "The argument for the defendant supposes the witnesses to be acquainted with the contents of the will. I cannot assume more from this attestation than that they saw Mrs. Keir sign the instrument." The will was consequently held to be an insufficient execution of the power. In this case, it is to be observed that the attestation contained the words *in the presence of*, but did not specify what it was that was done in their presence.

The doctrine enounced in these dicta of Lord C. J. GIBBS and Sir JOHN LEACH was much extended in the subsequent case of *Buller v. Burt*, (a) also before Sir JOHN LEACH. In that case the appointment was to be by deed sealed and delivered in the presence of, and attested by, two or more witnesses. The instrument concluded with the following words:—*signed and sealed at Cotton aforesaid, this 13th day of September, in the year of our Lord 1813, by L. Smith*, (L. S.) Witness, *John H. Burt. Hannah Bowles.* The Master of the Rolls is reported to have said that "the attestation of the witnesses being considered as a part of the appointment, it must follow that when the word '*witnesses*,' without more, is used in the attestation, it affirms that all has been done in the presence of the witnesses which is stated in the body of the deed." Upon this dictum, I would take the liberty to remark that the words of the deed are the words of the party executing it, not of the witnesses; and that I am unable to see on what ground the declaration of the party, that the requisite conditions have been complied with, can be substituted for the attestation of the witnesses, or how we can be justified in assuming, contrary to what the fact is likely to have been, that the witnesses are cognizant of the contents of the instrument, an assumption which, in *Stanhope v. Keir*, 2 Sim. & Stu. 37, the same Judge seemed to think he should not be warranted in making.

In this case of *Buller v. Burt*, (a) as well as in the two preceding

(a) Cited from MS. in *Doe dem. Spilsbury v. Burdett*, in K. B. The judgment is given *verbatim* from the MS. in the judgment of the Court of King's Bench, 4 A. & E. pp. 15, 16, 17 (31 E. C. L. R. 15, 16.)

cases, the execution of the instrument was held to be defective. The dicta to which reference has been made were not the foundations on which the judgments rested ; we cannot know whether the opinions of these learned Judges had been fully made up in regard to them, so that they were prepared to act on them. Those cases, therefore, cannot be considered as having established judicially that any thing short of an attestation by the witnesses, coextensive with the several acts required to be done, can be considered as a compliance with the requisite condition. To admit anything short of this as sufficient, tends to introduce uncertainty and confusion into a question in which precision and certainty are of the greatest importance.

On these grounds, I think that we ought not to fritter away the strict and intelligible rule laid down in *Wright v. Wakeford*, 4 Taunt. 213, by the introduction of subtle refinements and nice distinctions. The result is, that the appointment in this case was ill-executed : and therefore, in my opinion, the judgment of the Court below ought to be reversed.

GURNEY, B. The question for the consideration of the Court is, whether Mrs. Skynner did or did not duly execute a power conferred upon her by her marriage settlement ?

The terms in which the power is given, are "by her last will and testament," "to be by her *signed, sealed, and published* in the presence of, and attested by, three or more credible witnesses." Mrs. Skynner has made a will ; and she professes to do so in execution of the power, and to fulfil all its requirements. She commences, I "do publish and declare this to be my last will and testament." And, in the conclusion, she says, "I declare this only to be my last will and testament. In witness whereof I have to this my last will and testament, contained in one sheet, set my hand and seal." Then follow her signature and seal ; and the attestation in general. "Witness, *Charles Ball. Eliz^a. Ball. Anne Ball.*"

The objection which is made to this is, that the attestation is not to be construed to extend beyond the act of signing and sealing : that it must not be construed to extend to the commencement of the will, *I do publish and declare this to be my last will and testament*, nor even to the words, *I declare this to be my last will and testament*, but merely to the very last words, *in witness whereof I have to this my last will and testament set my hand and seal* ; and, therefore, that the *publication* of the will is not attested, and the execution of the power is on that account invalid.

The Court of King's Bench has decided that this is a good execution of the power ; and I think that that decision is right.

The subject is by no means free from difficulty. The Courts of Westminster Hall have, by their anxiety to see powers strictly executed, been led, I think, into nice and refined distinctions, by which the intentions of the creators of those powers have been grievously disappointed. It has been truly observed by Sir Edward Sugden, in his *Treatise on Powers*, vol. 1. p. 317—321, (6th ed.,) that the decisions which have been made upon the execution of powers are at variance with the decisions which have been uniformly made upon the subject of the execution of wills under the Statute of Frauds ; and I think that it has been unfortunate that these cases have been so decided.

Not to mention the cases which occurred before the year 1812, the

case which is considered to have settled the law upon this point is that of *Wright v. Wakeford*, 4 Taunt. 213, 17 Ves. 454.

In that case, the terms of the power were, *by any writing "under their and his hands and seals," "attested by two or more credible witnesses."* The form of the attestation was *"sealed and delivered by the within-named" A. and B. "in the presence of,"* &c. The objection was, that the attestation did not extend to the *signing*: it was an attestation of no more than of *sealing* and *delivery*; and, the *sealing* and *delivery* being specified, it must be presumed that the witnesses did not mean to attest the *signing*. Lord ELDON sent this case to the Court of Common Pleas; and the Court was divided in opinion. Two certificates were returned: one by Lord Chief Justice MANSFIELD, that the attestation was sufficient; the other by Mr. Justice HEATH, Mr. Justice LAWRENCE, and Mr. Justice CHAMBRE, that it was insufficient. It is perhaps too late to consider whether, if the case were now to occur, it would receive the same decision. I think that it is very much to be lamented that the majority of the Court felt themselves compelled by antecedent cases to come to that conclusion: it can hardly be doubted that it defeated the intention of the creator of the power. If the word "attested" had not been in the power, the decision would have been the other way. In the case of *M^{rs} Queen v. Farquhar*, 11 Ves. 467, where the power directed the instrument to be signed and sealed in the presence of witnesses, (but did not require an attestation,) and the attestation was to the sealing and delivery, Lord ELDON held that the execution was good, and said it would be a miscarriage in a Judge if he did not direct a jury to presume that the deed was *signed*, as it professed to be upon the face of it, in the presence of witnesses who attested the sealing and delivery. It does not readily occur to one's mind why a Judge may not make the same presumption which he may direct a jury to make. The case of *Wright v. Wakeford*, 4 Taunt. 213, has, however, been adopted since in several cases; and it is perhaps too late to be corrected, if it be erroneous. But the case went to the extremest verge, and ought not to be extended. If I find a case in all its parts the same as *Wright v. Wakeford*, I may be compelled to yield to it, but not otherwise. The facts of this case are different; and I think that the execution in this case cannot be impeached but by extending the doctrine of *Wright v. Wakeford*.

In this case the testatrix does all that the power requires. She *publishes*, she *signs*, she *seals*. The attestation is *general*. I think that it is to be taken that the witnesses attested all three. I think that they may fairly be taken to be as cognizant of the last line but one as of the last line, (if not of the first line as well as the last;) and, when the testatrix set about executing the power, and has studiously done all that the power required, I cannot consent to presume that they who have given a general attestation did not witness the whole and attest the whole. Independently of all parol evidence, it appears to me that it is the true conclusion from the premises.

What is the publication of a will, has been a matter of discussion in more cases than one; and in the case of *Moodie v. Reid*, 7 Taunt. 355, (2 E. C. L. R. 133,) Chief Justice GIBBS inquired of the bar what it meant, and received no answer; and he said that he was not surprised that he received no answer. If it means *nothing*, it would seem extraordinary that it should be requisite that that *nothing* should be attested

If it means *any thing*, I should suppose that it must mean that the testator, at the time of making the will, stated that that which he was so executing was his will. This, it appears to me, the testatrix has done; and this I think the witnesses have attested.

The last two cases that have been before the Courts have gone some way towards relaxing the extreme severity of the rule upon which the Courts had before acted.

In the case of *Simeon v. Simeon*, 4 Sim. 555, the power directed the will to be *signed and published* in the presence of and attested by witnesses. The form of the attestation was, "*signed and delivered in the presence of*," &c. It was decided that the power was well executed.

Ward v. Swift, in 1832, 1 Cro. & M. 171, S. C. 3 Tyrwh. 122, was a case sent by the Lord Chancellor for the opinion of the Court of Exchequer. The terms of the power were, the will to be *published under hand and seal*, in the presence of, and *attested* by, three witnesses. The attestation was, *signed, sealed, and delivered*. The Court certified that the power was well executed.

In both those cases, *delivered* was held to be equivalent to *published*.

Upon the whole, I am of opinion that the judgment of the Court of King's Bench should be affirmed.

ALDERSON, B. In this case, the circumstances of which have been already adverted to by my two learned Brothers who have preceded me, the only question is, whether the power conferred by the settlement of 4th and 5th December, 1787, on Lydia Henning Ward, has been properly executed by her. The power was to be executed by an instrument to be by her signed, sealed, and published, in the presence of, and attested by, three or more credible witnesses.

Now what is it that is required by such a power? That must depend entirely on technical rules, and on the authorities to be found in our books. In all cases, but most especially in those relating to real estate, it is of the greatest importance to adhere to established rules. Even if we think that originally they were established on what now appear to us insufficient reasons, we ought to adhere to them; because men have in all probability accommodated themselves to them, and, in the creation of their subsequent instruments, acted upon them: so that it will almost inevitably happen that in over-ruling them we shall do the greatest injustice to those who have relied upon the faith of the decisions, and contradict also the actual intentions of innocent parties. Thus to act is to introduce into the law, and into a branch of it in which certainty is of the greatest importance, the greatest uncertainty and fluctuation of opinion. And I think that the evil is, if possible, increased by distinguishing cases on minute and trivial grounds, and practically, although not in terms, over-ruling the prior decisions.

If, therefore, the examination of the cases already decided leads me to the conclusion that the word "attest," in such a power as this, means "subscribe a memorandum of attestation," and that, in order to make such execution valid, the attestation must express all the requisites which the witnesses are called upon to attest, I must, however I may regret it, hold that this power is ill executed, and that the decision of the King's Bench is wrong. And this is the conclusion at which, after much consideration, I have arrived.

The leading case on this point is that of *Wright v. Wakeford*, 4 Taunt. 213. There the power was required to be executed by an

instrument under hand and seal, attested by two witnesses; the memorandum of attestation expressed that it was "sealed and delivered," and was silent as to the fact of signature: but the deed itself purported to be executed in pursuance of the power therein recited, and was actually signed as well as sealed. The majority of the Judges of the Court of Common Pleas certified their opinion to the Lord Chancellor to be that the power was ill executed: and, in their certificate, (after admitting that a jury might, as a question of fact, have come to the conclusion that the witnesses saw the signing as well as the sealing and delivery,) say that, "as a question of law," "it must be determined by the true construction of the terms of the attestation;" to which the "consideration must be confined;" and that the signature was not "comprehended in the words made use of in the attestation." And even Lord Chief Justice MANSFIELD, who differed from them, seems to me to have construed (more liberally, indeed, but still to have construed) the words of the attestation as including signature, rather than to have come to the conclusion that *attested* was not to be considered as requiring an expression in writing of the particulars requisite for the due execution of the power.

This case appears to me, as plainly as words can express it, to have decided that "attest" means "subscribe a memorandum of attestation containing all the particulars required for the due execution of the power." This case has never been over-ruled: but, on the contrary, has been expressly confirmed by the cases of *Doe dem. Mansfield v. Peach*, 2 M. & S. 576; *Wright v. Barlow*, 3 M. & S. 512, and *Hougham v. Sandys*, 2 Sim. 95, in which the same defect was held fatal to the execution of the power; and by the introduction of a bill into parliament, stat 54 G. 3, c. 168, whereby the inconvenience resulting therefrom was in part remedied.

It is, indeed, contended that these cases are distinguishable from the present, because the memorandum of attestation there expressly contained some of the requisites; and the maxim *expressio unius est exclusio alterius* is applied. To my mind this is not just reasoning. *Wright v. Wakeford* decided, if it decided any thing, that the requisites must be expressed in the attestation. Whereas the maxim referred to has only reference to inferences of fact to be drawn from written documents or parol declarations. It only means that, if you expressly name some out of certain requisites, the inference is stronger that those omitted are intended to be excluded than if none at all had been mentioned. Neither can, however, exclude the real fact from being proved or shown. But, according to *Wright v. Wakeford*, the requisites must all be expressed in the written attestation: a decision which leaves nothing to inference, and puts the omission of any one on exactly the same footing as the omission of all. Such a distinction, therefore, would practically over-rule *Wright v. Wakeford*, and the other cases which followed it, whilst in words it supported them.

But there are not wanting cases in which a general attestation has also been held equally within the rule. In *Moodie v. Reid*, 7 Taunt. 355, 1 Mad. 516, (2 E. C. L. R. 133,) the attestation was only, *Witness B. H., J. H.* The Court of Common Pleas held it a bad execution of a power which required a will to be signed and published in the presence of, and attested by, two witnesses. Again, in *Stanhope v. Keir*, 2 Sim. & Stu. 37, the attestation was, *in the presence of,*

and in *Buller v. Burt*, antè, p. 333, note (a), *witness*. In all these the execution was held bad, although in all the facts had taken place in the presence of the witnesses which they were required to attest. But they were decided upon *Wright v. Wakeford*: and in *Hougham v. Sandys*, the Vice-Chancellor expressly says, in expounding *Wright v. Wakeford*, that the proper meaning of the term *attest* was, that the witnesses should, *by the written attestation*, give their evidence to the fact that the instrument was signed as well as sealed.

But then it is said, and on this the decision in the King's Bench turned, that in construing a general attestation the Court is at liberty to look beyond the mere attestation, and even to look at the whole of the deed for that purpose. Sir JOHN LEACH is reported to have said, in *Buller v. Burt*, that, when the word *witnesses*, without more, is used in the attestation, it must be taken to affirm that all has been done in the presence of the witnesses which is stated in the body of the deed. If this principle be true, there can be no doubt that the decision of the King's Bench in this case is right. But I cannot agree to the principle, which appears to me founded on a forgetfulness of the learned Judge, or, which is perhaps the case, a misapprehension of the reporter, as to the distinction which the previous cases had established between *attesting* and *witnessing* a deed. There is no doubt, as was laid down by Lord ELDON in the case of *M^cQueen v. Farquhar*, 11 Ves. 478, that, if a power is required to be executed in a particular way in the presence of witnesses, and the attestation be general, the Court or jury may look at the whole deed, and may infer, as a conclusion of fact, that what is stated in the deed to have been done was in the presence of the witnesses. The deed itself is *prima facie* evidence of this, and may be looked at for that purpose; for, in those cases, the requisites may be properly ascertained from such inference, or by parol evidence of the fact.

But the cases which we are considering require that the requisites shall not only be witnessed but attested: and, in order to fulfil the meaning of the word *attested*, they decide that what the witnesses have witnessed they shall state that they saw done. And this, I think, can only be done by the attestation clause itself, which contains that which the deed does not, the declaration of the witnesses themselves. The deed shows what the party executing it did at the time: and we may perhaps infer, from that, that the witnesses saw it done: but the attestation itself alone can, as it seems to me, *express* the facts which they saw and attest. In these powers the creator of them did not mean to leave anything to inference. That, at least, is what the case of *Wright v. Wakeford*, and those depending on it must, I think, be taken to have decided on this subject.

To construe the attestation by reference to the body of the deed is, moreover, directly at variance with several of the decided cases. In *Doe dem. Mansfield v. Peach*, 2 M. & S. 576; the deed contained a statement of the requisites having been complied with; and that, too, in the very terms of the power; yet the decision was, that the power was ill executed. So in *Wright v. Wakeford*, and the others which resembles it, the fact of the signature appeared on the face of the deed. In *Stanhope v. Keir*, 2 Sim. & Stu. 37, the testimonium clause began, "And this is my last will;" which, if said in the presence of the witnesses, was a clear publication; yet Sir JOHN LEACH held it ill executed,

saying expressly that the argument, that the declaration with which the will concluded was in fact a publication as well as a signing, and that the witnesses, by adding their names to this declaration, attested both facts, supposed the witness to be acquainted with the contents of the will. He could not assume more from this attestation than that the witnesses saw the testatrix sign the instrument. This reasoning would make me think that the dictum of Sir J. LEACH in *Buller v. Burt*, which, it may be observed, was one wholly unnecessary to the decision in that case, has been inaccurately reported. At any rate, it is at variance with several other decisions, and is, I think, contrary to principle for the reasons which he himself has given. The same does not, indeed, apply to the dictum of GIBBS, C. J., in *Moodie v. Reid*, 7 Taunt. 353, (2 E. C. L. R. 133,) for that may depend on the attestation of the witnesses being placed opposite to the signature of the testatrix; in which case it agrees with the observation to be found in *Stanhope v. Keir*.

These two dicta, however, both unnecessary for the decisions of the respective cases, and both at variance with several decisions, are not sufficient authority in my opinion for the decision in this case. Neither can I find any authority for referring to the testimonium clause, even if that would do, (which I think it will not,) to support this judgment. If any part of the deed can be looked at, I do not see why the whole may not be taken into consideration.

Upon the whole, my opinion is that, in conformity to *Wright v. Wakeford*, and the other decisions following it, we ought to hold that it is necessary to express in the attestation itself that the requisites have been complied with. It is not, indeed, necessary that the very words of the power should be followed. If there are words capable of bearing the construction, it is enough. *Ward v. Swift*, 1 Cr. & M. 171, S. C. 3 Tyrwh. 122; *Simeon v. Simeon*, 4 Sim. 555; *Lempriere v. Valpy*, 5 Sim. 108, and the late case in the Exchequer, *Curteis v. Kenrick*, 3 M. & W. 461, have decided that any words in the attestation, showing the will or instrument to have been completed as an operative instrument, will satisfy the word *published*, or the word *delivered*, in a power. But there must be some expression capable of receiving a construction to the effect required. I think that it is not competent to supply any defect in the attestation by resorting to the words of the deed, or even of the testimonium clause; because to do so seems to me to suppose the witnesses to see the deed, which is contrary to the fact in most cases, and to supply by inference alone that which, according to the decided cases, the party creating the power meant should be expressed in the attestation itself, and not left to inference at all. (a)

I concur with Sir E. Sugden, in his book *On Powers*, in wishing that these cases had at first been decided in conformity to those on the Statute of Frauds; but I am bound by their authority.

For these reasons, I think the judgment of the King's Bench ought to be reversed.

(a) This is the construction put upon these cases by Sir E. Sugden, as appears from the act drawn by him, and which is to be found, No. 8, in the appendix to his book *On Powers*. The preamble to that act is as follows:—"And whereas the form of the attestation frequently, from ignorance or inadvertence, has not contained the full statement of the acts which the witnesses were required to attest," whereby titles have been defeated, &c. This shows what that eminent lawyer takes to be the result of the cases.

BOSANQUET, J. After much consideration, and some fluctuation of opinion, I think that the case affords sufficient ground for affirming the judgment of the Court of Queen's Bench.

It may be assumed, as a rule now too well established to admit of dispute, that where the instrument which creates a power prescribes certain formalities to be observed in the execution of it, attested by witnesses, the witnesses must attest all those formalities, and their attestation must appear upon the face of the instrument executed.

In *Wright v. Wakeford*, 17 Ves. 454, Lord ELDON expressed his opinion that the proper meaning of the term *attest* was, that the witnesses should, by their written attestation, give evidence to the fact that the instrument was signed as well as sealed and delivered. And Lord ELLENBOROUGH, in delivering the opinion of the Court in *Doe dem. Mansfield v. Peach*, 2 M. & S. 581, says, "To make a due execution of the power, there must be a making of an instrument with all the forms required by the power, and that there must be an attestation of its execution with all those forms." If therefore signing, sealing, and publishing be required, and any one of them be unattested, the execution of the power will be void.

The question then is, whether the publication of the will before the Court appears upon the face of the will to have been duly attested.

The signatures of the three witnesses are immediately preceded by the word *witness* only, unaccompanied by the ordinary memorandum expressing what the matters are which they profess to attest. It must be admitted that, in the absence of any such memorandum, it cannot be argued that, by professing in terms to attest signing and sealing, the attestation of publication is excluded. But the question remains, what have they attested? The will begins in the words, "I, Lydia Henning Skynner, do *publish and declare* this to be my last will and testament." It then proceeds, "I appoint my beloved husband," &c.; and, after making several dispositions of property, concludes thus: "I *declare* this only to be my last will and testament. In *witness whereof* I have to this my last will and testament, contained in one sheet, set my hand and seal, the 12th day of September,

Lydia Henning Skynner.

in the year of our Lord 1789.

Witness,

Charles Ball.

Eliza.

Ann Ball.

Lydia Henning Skynner. [L. S.]"

The whole will, including the seal and signature of the testatrix and the attestation of the witnesses, was on one sheet. The first signature was at the bottom of the second page; and what follows was written on the top of the third page of the same sheet, the seal and signature of the testatrix being on the right side of the page, and the word "witness," and the names of the witnesses immediately opposite to them, on the left side.

The donor of a power, in creating it, may undoubtedly prescribe whatever ceremonies he may think proper to accompany the execution; and, if he requires the observance of such ceremonies to be attested, the attestation of them ought so to be manifested that all who derive title under the instrument executed may thereon see recorded the testimony of the witnesses to the due observance of those ceremonies. In this

case, after the word *witness*, the names of the three witnesses without more are subscribed. But the testatrix, by the concluding clause of the will, professes to have declared this to be her last will and testament, and in witness thereof to have set her hand and seal; and, if the signature of the witnesses can be referred to that clause, it may be taken to declare their attestation of what that clause contains. It certainly is not necessary that the memorandum of attestation should be written by any of the witnesses themselves; nor is it usual for any of them to write it: if they sign such a memorandum, though they may never have read it, that is enough to constitute a written attestation. And it appears to me that, in the present case, by signing under the word "witness," without more, we are justified in holding that the witnesses have adopted the words used by the testatrix in that clause of the will, immediately above their own signatures, which describes the mode of execution. If that be so, have they not attested the *publication* of the will as well as the signature and seal of the testatrix? I fully admit that the terms of the instrument which created the power must be taken to import that publication is something more than signing and sealing. This was the opinion of Lord HARDWICKE, who, in speaking of a trial at bar in the King's Bench, upon the will of Mr. Windham of Clearwell, in *Ross v. Ewer*, 3 Atk. 161, said, "The only question was, whether the testator *published* it, for there was no doubt of his executing it in the presence of three witnesses, or their attesting it in his presence, which shows that *publication* is in the eye of the law an essential part of the execution of a will, and not a mere matter of form." Whatever the nature of the act may be, therefore, it is some act which is required both to be done and to be attested.

I am disposed to agree in opinion with those of my learned brothers who think that the execution of the power in this case is not to be supported upon the ground that the witnesses, by subscribing their names, have attested the *publication* mentioned at the commencement of the will. To assume that the witnesses were made acquainted with the contents of the will would be to assume what is contrary to all experience. It is not necessary to the validity of an attestation that the witnesses should even know the nature of the instrument which they attest; *White v. The British Museum*, 6 Bing. 310, (19 E. C. L. R. 91;) and an attesting witness is not considered, in practice, as affected with the contents of an instrument to which he has subscribed his name. See 3 Sugden's Vend. and Purch. 479, (10th ed.) I find no principle, therefore, upon which it can be inferred that the witnesses who have subscribed the will in question were cognizant of the words at the beginning of it, which purported that the testatrix had published the paper as her will, and that they professed to bear witness to her having so done. But, when the testatrix, after having completed all the dispositions of her property, concludes with these words, "I declare this only to be my last will and testament. In witness whereof" (that is, of which declaration) I have "set my hand and seal," and the witnesses add immediately after, "*witness, C. B., E. B., A. B.,*" I think that there is just ground for holding that the witnesses profess to add their witness to the witness of the testatrix, with respect to the manner in which she has executed her will. If the witnesses had subscribed a memorandum in the following words,—“Declared to be the only last will and testament of L. H. S. In witness whereof she has set her hand and seal

this 12th September, 1829,"—there could, I apprehend, be no doubt, that a publication, as well as signature and seal, would have been duly attested. For, if a declaration be something in addition to signing and sealing, it must, I conceive, amount to a publication. When the witnesses subscribe their names, they must be supposed to profess that they attest something. In the absence of any special memorandum, what do they profess to attest? If they attest the seal and signature, why do they not attest the declaration of the testatrix also, which is recorded in the same clause with her signing and sealing?

It appears to me that the testatrix and the witnesses may be considered as having signed the same memorandum of execution; that what she professes to testify they also testify; and that their attestation, subscribed to what they witness, is to be understood as if it were written "Witness to the same." How refined is the distinction between signing immediately under the testimonium clause, and signing the same terms an inch below it on the same page in the form of a memorandum!

I do not find that any of the cases are inconsistent with the view which I have taken of the subject. If, indeed, it has been settled by judicial authority that, notwithstanding the concluding clause of the will descriptive of the ceremonies, a distinct memorandum of attestation is necessary to satisfy the power, *cadit quæstio*; for there is no such memorandum in this case. I should certainly think it my duty to bow to such authority, for the reasons well stated by my Brother ALDERSON; but I do not find that any such rule has been established; and I do not feel myself called upon to extend an arbitrary principle with respect to the validity of wills executed under powers, by which a disposition of property actually accompanied with all the ceremonies prescribed by the power is to be defeated, and which is at variance with the principle applied to wills executed under the Statute of Frauds. In the case referred to, of *Wright v. Wakeford*, 4 Taunt. 213, the power was to make sale by writing under hands and seals attested by witnesses. The testimonium clause stated the instrument to be both signed and sealed; but the attestation was only "*sealed and delivered by*" the testator "*in the presence of*" (the witnesses.) And it was held by HEATH, LAWRENCE, and CHAMBER, Js., against MANSFIELD, C. J., that the power was not duly executed for want of attestation of the signing, no mention of signing having been made in the special memorandum of attestation. *Moody v. Reid*, 7 Taunt. 355, 1 Mad. 516, (2 E. C. L. R. 133,) was the case of a power to dispose by will signed and published in the presence of, and attested by, two witnesses. The will concluded in these words, "These my last bequeaths *signed by me* this 4th day of February, 1812. *Sarah Moodie*. Witness, *Betty Headington, June Headington*:" making no mention of publication. GIBBS, C. J., said, "The power is to be exercised by a will signed and published. Therefore there must be some publication here: the will must be signed, published, and attested; and there must therefore be some attestation here, of signing and publication." "It is established," by *Wright v. Wakeford*, "that the witnesses must attest every thing that is necessary for the execution of the power. *Here the witnesses have clearly attested the signing*; the question is, whether they have attested the other formality, of publication, in attesting the signing." Now it must be observed that, unless the signature of the witnesses could be coupled with the clause which stated the signing, there was no attestation of that act any more than

of the publication. The Chief Justice proceeds, "If the act of the testatrix in calling on the witnesses to attest her will, be a publication of it, then their attesting that she signed it, attests her publication also, because they attest that by which she publishes it." The Court took time to consider of their opinion; and then certified that the will was not a due execution of the power, thereby deciding that *signing her last bequeaths in the presence of witnesses* did not amount to a publication. If the testatrix in that case had in *fact* called upon the witnesses to attest her last bequeaths, or stated that she had done so, that circumstance would have justified them in attesting a publication: but there was nothing to show, by the attestation, that any thing of the kind had taken place; and the concluding words of the testatrix, "These my last bequeaths signed by me," contain no assertion of her having done an act of publication to which the attestation of the witnesses could be ascribed. She might have signed, and the witnesses might have attested such signature; and yet the testatrix might never have done any thing beyond signing to manifest publication as required by the power. In *Stanhope v. Keir*, 2 Sim. & Stu. 37, the power was to dispose by will, signed and published in the presence of, and attested by, witnesses. The will concluded, "This is my last will and testament, made and signed in the year of our Lord 1818, on the 19th day of November, at Gravesend, in the county of Kent. (Signed) *Eugenia Keir*, [L. s.] In the presence of *C. M. L., T. B., A. E.* Sir JOHN LEACH, V. C., said, he could not assume more from the attestation than that Mrs. Keir *signed* the instrument, and that, as the *publication* was not attested, the power was not well executed. Here, again, the Vice-Chancellor treats the witnesses as adopting the statement in the testimonium clause, that the will had been signed by the testatrix. If a distinct memorandum of attestation was necessary, the signing was as much unattested as the publication. *Buller v. Burt* (a) was the case of a power to dispose by deed sealed and delivered in presence of, and attested by, witnesses. The instrument concluded, "Signed and sealed at," &c., "by *L. Smith*, [L. s.] Witness, *John H. Burt. Hannah Bowles.*" Sir JOHN LEACH, then M. R., held the power not to be well executed, because delivery was not attested. He said that, where the word "witnesses," without more, is used on the attestation, it affirms that all has been done in the presence of the witnesses which is stated in the body of the deed; that, in the body of the deed, it was stated to be signed and sealed, but not stated to have been delivered; and, as the word "witnesses" could affirm no more than the deed stated, there was no attestation of delivery. If, by the body of the deed, the Master of the Rolls must be understood to mean the general contents of the deed, his dictum may well be doubted, since it must assume the witnesses to be acquainted with those contents; but, if he meant only the testimonium clause which immediately preceded the word *witness*, the observation may be just, upon the supposition that the witnesses, by subscribing their names after the word witness only, incorporated in their attestation the description of the formalities immediately preceding it.

To suppose that the Master of the Rolls meant more than this, would be inconsistent with his observations in *Stanhope v. Keir*, 2 Sim. & Stu. 37, where, in answer to the argument of counsel that the witnesses by signing had attested a declaration of the testatrix which amounted

(a) See *antè*, p. 333. note (a); S. C. 6 Nev. & Man. 281.

to a publication, he said, "The argument for the defendant supposes the witnesses to be acquainted with the contents of the will. I cannot assume more from this attestation than that they saw Mrs. Keir sign the instrument."

The last case to which I shall refer is *Ward v. Swift*, 1 Cr. & M. 171, S. C. 3 Tyrwh. 122. The power was to appoint by deed, &c., or by will duly executed and *published* under hand and seal in the presence of, and attested by, witnesses. The will concluded, "In witness whereof I have set my hand and seal hereto, this 5th day of August, A. D. 1801, in the presence of the underwritten, Mary Swift, (L. s.) Signed, sealed, and *delivered* this 5th day of August, 1801, as the last will and testament of the said testatrix, Mary Swift, who, in her presence, and in the presence of each other, have put our names as witnesses thereof." This was held by the Court of Exchequer to be a good execution of the power; the delivery of the instrument as a will, which was attested, being justly deemed a publication within the meaning of the power; the word, "delivered" in the attestation being very properly held to satisfy the word "published" in the power. In the present case, it appears to me that the word "declared" ought to have the same effect. I am quite aware of the expression of Lord ELDON in the case already cited, of *Wright v. Wakeford*, 17 Ves. 454, that the meaning of the term "attest" is that the witnesses, by their written attestation, should give evidence to the fact that the instrument was signed as well as sealed; but it certainly is not necessary that they should write any thing but their own names, provided their names are subscribed to the written expression of the ceremonies having been observed. So that the question still must be, whether the witnesses have or have not subscribed such written expression of acts done as the power requires; and it must be remarked that all the cases above referred to, in which the simple signatures of the attesting witnesses appear to have been thought referable to the testimonium clause of the will, have occurred since the case of *Wright v. Wakeford*, 4 Taunt. 213, S. C. (in Chancery) 17 Ves. 454.

In the various cases where the execution of the power has been held insufficient for want of attestation of some particular ceremony, the attestation of that ceremony was either impliedly excluded by the terms of the memorandum of attestation, or there was nothing in the language of the clause descriptive of the ceremony observed in the execution of the instrument to which the signatures, unaccompanied by any memorandum of attestation, could be referred; there is, therefore, no case in point to govern the decision of the Court. It must be borne in mind that the only question is, whether what appears upon the face of the instrument can be fairly construed by the Court to amount to a declaration that the witnesses have attested publication. A determination in the affirmative does not dispense with proof of the fact that the will was actually published, and published in the presence of the witnesses, without which proof the most precise memorandum of attestation would be of no avail.

In this case, it appears by the special verdict that the will was actually published as required. Thinking, therefore, as I do, after the best consideration which I have been able to bestow upon the case, that, consistently both with principle and authority, we are at liberty to hold that the witnesses have attested a *declaration* of the testatrix that the

instrument which they subscribed was her last will, as well as that she signed and sealed it, I am of opinion that the power has been duly executed.

PARKE, B. The question in this case is, whether the will of Lyd'a Henning Skynner was a due execution of the power given by the settlement of 4th and 5th December, 1787? It is with great regret that I have come to the conclusion that the power was not duly executed.

The cases of *Wright v. Wakeford*, 4 Taunt. 213; *Doe dem. Hotchkiss v. Pearce*, 6 Taunt. 402, (1 E. C. L. R. 427; and *Doe dem. Mansfield v. Peach*, 2 M. & S. 576, (which I cannot help considering as unfortunate decisions), have established this rule of construction, that, if the donor of a power requires an instrument to be executed with certain formalities in the presence of, and attested by, witnesses, he must be understood to mean, not merely that the *instrument*, but that all the required *formalities*, shall be attested by the witnesses, and stated by a memorandum in writing to have taken place in their presence: the presumed intention being, that there should be on the face of the instrument itself a memorial that all the conditions necessary to the due execution of the power have been complied with. These decisions have since been followed by others, in which it has been held that a general form of attestation by the use of the word *witnesses* is insufficient where the power required a will to be signed, sealed, and *published* in the presence of, and attested by, witnesses, on the ground that there was no attestation of the fact of publication, which is something beyond the mere act of signing and sealing. These are the cases of *Moodie v. Reid*, 7 Taunt. 535, 1 Mad. 516, (2 E. C. L. R. 133; *Stanhope v. Keir*, 2 Sim. & St. 37; *Buller v. Burt*, (a) and *Allen v. Bradshaw*, 1 Curt. 110; and by these decisions I consider that we are bound; and it would be a most dangerous course to overrule them directly, or to elude their authority by relying on slight and unsatisfactory distinctions, since the rights acquired under them, and titles accepted on the faith of them, might be thereby disturbed. In no branch of the law is it so important as in this to abide by previous decisions. I am compelled, therefore, very reluctantly, and only in consequence of these cases, to say that the present attestation is insufficient, inasmuch as it does not by express words or implication contain a statement that all the *three* requisites of the power were complied with, unless the ground which was taken by the Court of King's Bench, and relied upon in argument in this Court, can be supported.

That ground is, that the witnesses must be taken to attest what is stated in the body of the instrument, and that all the requisites are in this case stated in the body of the instrument to have been performed. I do not think this distinction is satisfactory. It proceeds upon the supposition that the whole instrument may be read together to explain the meaning of the word *witnesses*; which necessarily presumes that the attesting witnesses are cognizant of the contents of the instrument, which in practice they certainly are not; and it would be a dangerous doctrine, with reference to their interests, to assume that they had knowledge of all that is stated therein. *The memorandum of attestation alone is their act*. It may be, as was said by the Attorney-General, that they do not read even this when it is prepared for them, any

(a) See *antè*, p. 333, note (a).

more than the deed itself; and very often they do not; a course which is very negligent and improper; for witnesses ought not to subscribe a statement which they do not know to be perfectly true: but still it is their act; and, if it expresses all that the donor of the power required, and all was really done, the power is in that respect well executed. But this is no reason for holding that the whole instrument, which they never read in the ordinary course of business, can be referred to, in order to explain the memorandum of attestation, and to show that the witnesses mean to attest the performance of the required formalities. I must own I have a great difficulty in saying that any thing which precedes the signature and seal to the instrument can be connected with, and read as part of, the memorandum of attestation. Even the concluding or witnessing part, the testimonium clause, as it is sometimes called, in which the *maker* of the instrument denotes by some expression that *he* signs and seals in witness of the completion of the instrument, cannot be assumed to be known to the witnesses. But, supposing that it is, this clause in the present case states only the setting the hand and seal of the testatrix to the will, which, according to *Moodie v. Reid*, *Stanhope v. Keir*, and *Allen v. Bradshaw, &c.*, is not enough. And, even supposing the memorandum of attestation to be connected with the whole will, I do not see that the will does in this case state that the formalities were intended to be complied with. It does not appear that the testatrix has declared the will to be hers, or meant so to declare it *in the presence* of the witnesses. I "publish and declare this to be my last will," in the beginning, and "I declare this only to be my last will" at the end, do not import more than that, *by the act of so writing*, she publishes and declares it to be her will, not that she so publishes and declares it, as an independent act, in the presence of "witnesses." The expression in *Moodie v. Reid*, "these my last bequests signed by me," is equivalent to saying, "I declare these to be my last bequests." The words in *Stanhope v. Keir*, "this is my last will and testament," have the same meaning. So that, even if the whole is read together, the case cannot be satisfactorily distinguished from those authorities.

Even then, if we should adopt the proposition that all the instrument might be read to explain the general term *witnesses*, and that, where the instrument purported, on the face of it, to be intended to be made with all the precise formalities required by the power, so that the donee of the power must have had those formalities distinctly in his mind, the general term *witnesses* must be intended to mean that all those formalities were witnessed by the persons subscribing, (a proposition which I do not think can be supported, and for which there is, I believe, no other authority than the dictum of Sir JOHN LEACH in *Buller v. Burt.*) yet still this instrument does not answer the supposed description; for it does not appear, by any statement therein, that the maker of it had those precise formalities in contemplation.

I am obliged, therefore, to come to the conclusion that this judgment cannot be supported upon the ground on which it was rested by the Court of King's Bench; and the authority of the decided cases prevents it being sustained on the ground that the general form of attestation implies a statement that the witnesses saw, not only the acts of signing and sealing, but those acts done *as indicative of a completion of the instrument*, which would probably amount to a publication. As long as those cases remain unreversed by the highest tribunal, we are bound

by them, though we may doubt or disapprove of the reasons on which they proceeded. I am, therefore, of opinion that the judgment of the Court of King's Bench ought to be reversed.

VAUGHAN, J. After the able and elaborate judgment delivered by the two learned Barons and my Brother COLTMAN, with whom I concur, perhaps I might abstain from entering upon the reasons which have brought my mind to the same conclusion; but, as the Court below were unanimous in their judgment, which deservedly challenges the highest consideration, I feel it more respectful to state shortly the grounds of my opinion, without minutely investigating or commenting upon the cases which have been cited.

The execution of a power derives its validity solely from a compliance with the terms under which it was created; and, when an attestation is required, it is in order that the witnesses may pledge themselves to the fact that those terms have been fulfilled.

The donor of the power, the execution of which we are now considering, engrafted upon its exercise a condition that it should be appointed by will or codicil to be "signed, sealed, and published in the presence of, and attested by, three or more credible witnesses." And the question is, whether the condition prescribed has been duly performed?

The formalities insisted on by the creator of the power in question, and therefore essential to its proper execution, are of two kinds, which may be separately considered. First, those required to be observed by the appointor; and, secondly, those required to be observed by the witnesses to the appointment. The one must sign, seal, and publish, in *their* presence; the others must *attest*.

First, then, of the witnesses to the appointment. They *must attest*. We are here brought face to face with the first difficulty. What is an *attestation*? The derivation of the word is clear and simple, "testor ad;" and, although I do not find any judicial definition of its meaning, I conceive it to be a *written statement of each separate fact essential to the formal execution of the power, subscribed by the witnesses*. Thus, in the case of *Moodie v. Reid*, GIBBS, C. J., said, "It is established," by the case of *Wright v. Wakeford*, 4 Taunt. 213, "that the witnesses must attest every thing that is necessary for the execution of the power;" and therefore there must "be some attestation here, of signing and *publication*." And in that case the power was held to be badly executed, because the attestation did not state the *publication*, but only the signing. And in *Doe dem. Mansfield v. Peach*, 2 M. & S. 576, the execution was held bad, because the attestation stated only sealing and delivering, and not *signing*. But, although in every attestation there must be a written statement of each separate fact essential to the formal execution of the power, yet it does not seem absolutely necessary that such attestation should be contained in an *attestation* clause, or memorandum subsequent to the signature of the appointor, and distinct and separate from the testimonium clause. In some cases, where there has been no such separate memorandum, the testimonium clause of the will itself has been considered as the attestation clause, and the statements therein contained have been held the same for all purposes of attestation. In the case of *Moodie v. Reid*, before cited, there was no separate attestation clause; but the concluding clause in the will ran in the following terms: "These my last bequeaths signed by me this 4th day,"

&c.; on which followed the signature of the appointor and the witnesses. Here it was held that the signing *was* attested, and nothing else. The case before us, therefore, so far resembles the case of *Moodie v. Reid*, 7 Taunt. 355, (2 E. C. L. R. 133,) that there is no separate attestation clause; and the will concludes with the following sentence: "In witness whereof I have to this my last will and testament" "set my hand and seal, the 12th day of September, in the year of our Lord One thousand seven hundred and eighty-nine." This sentence, therefore, may be considered as the attestation clause; and we are thus brought to the question, whether, if this clause contains an insufficient attestation, we can look back to the body of the will in order to aid the imperfection. I conceive not. It has been decided that, where the distinct attestation clause is imperfect, it cannot be aided by statements in the body of the will. Thus, in *Doe dem. Mansfield v. Peach*, 2 M. & S. 576, where, in order to constitute the execution a sufficient execution, it was necessary that it should be under *hand* and seal, and attested, and the attestation contained a statement of "sealing and delivering" only, although the *body* of the instrument expressly stated it to be *signed* and sealed, yet it was not permitted to call the terms in the *body* of the will in aid of the attestation clause, and the execution was held bad in consequence. If, therefore, the *testimonial* clause is to be considered as the attestation clause, it seems but rational to apply the same rules in the interpretation which would have operated upon the attestation clause itself, had it existed in a separate form. In such case, it would have been impossible to look beyond the clause itself *into the body of the will*, in order to supply expressions necessary to give validity to the appointment: and the same principle, when applied to the testimonial clause, will exclude any terms which are not contained in it, although they might be disclosed in a former part of the instrument, and might be necessary to give the instrument validity. If the rule has been so closely and rigidly adhered to in the case of the attestation clause, we are surely prohibited from extending any special indulgence to the testimonial clause, which is merely its substitute. The jealousy of the law in such cases was exemplified in the case of *Stanhope v. Keir*, 2 Sim. & Stu. 37, in which case there was an attestation clause running in the following terms:—"Signed) *Eugenia Keir*. (L. s.) In the presence of" *A. B., C. D.* This clause was immediately preceded by a sentence thus expressed: "And this is my last will and testament, made and signed in," &c. The Vice-Chancellor refused to consider this sentence as part of the attestation, although immediately preceding and introducing the other. Those cases, which have been decided in a spirit the most liberal and lenient towards the appointor of the power, have not attempted to consider as part of the attestation any statements lying without the testimonium clause. Thus in *Buller v. Burt*, (a) the instrument concluded thus: "*Signed and sealed at Cotton* aforesaid, this 13th day of September, in the year of our Lord 1813, by *L. Smith*;" then followed the names of the witnesses. It was held in this case that the signing and sealing alone were attested. The Master of the Rolls is reported to have said that, by the subscription of the witnesses, it was affirmed that all had been done which was stated in *the body of the deed*. But we are bound to interpret such general language as *the body of the deed*, both by the manner in which it was applied in *that*

(a) See ante, p. 333, note (a.)

case and by the opinion of the same learned Judge, as expressed on other occasions. Thus in the case of *Stanhope v. Keir*, he expressly declared that the witnesses could not be held acquainted with the contents of the will. Both statements may be reconciled, by supposing that the learned Judge distinguished between the *body* of the deed (which expressions were evidently intended by him to apply in *Butler v. Burt* to the testimonium clause only) and the contents of the will, as expressed in the judgment in *Stanhope v. Keir*, where no separate attestation clause existed.

Having thus stated my opinion that the attestation must contain a statement of every fact and formality essential to a due execution of the power, and that such attestation must be found in the testimonium clause, (if there be no separate attestation clause,) it remains only to apply those principles to the case before us. What are the facts required to be attested? and what are the facts actually attested in the testimonium clause? Signing, sealing, and publishing must be all virtually stated in the attestation. The attestation runs in the following terms: "In witness whereof," (*i. e.* of something forming part of the will, and with which in consequence the witnesses are not acquainted,) "I have to this my last will and testament, contained in one sheet, set my hand and seal." It has been suggested, and I wish I could adopt the suggestion, that the words immediately preceding the testimonium clause, *viz. I declare this to be my will*, may be incorporated with and read as part of it. With every inclination to overcome difficulties which are opposed to the justice of the case, I feel myself constrained to withhold my assent to this proposition. I cannot but regard it as a separate and distinct clause in every view. It is written as a separate sentence. In structure and grammatical form, it is a separate sentence. The mere fact of its immediately preceding cannot make it the same sentence. By such a method of reasoning, each preceding clause in the will might be considered as part of that which follows; and the whole will would thus become one sentence. In *Stanhope v. Keir*, as it has been seen, a sentence of similar import preceded in a similar manner the attestation clause; but the Court refused to look at it.

If, then, the signing and sealing the will do not in themselves amount to a publication, the statement of signing and sealing the will is no statement of publication. Now it has been expressly decided, in the case of *Moodie v. Reid*, 7 Taunt. 355, (2 E. C. L. R. 133,) that signing the will could not be considered as a publication. "These my last bequeaths signed by me," was the language there used, and there declared insufficient, as an attestation of publication. It is not here necessary to define what publication is, since signing has been held *not* to amount to publication; and, if signing be not, how can sealing be so? It is a much less operative and essential formality in respect of a will than signing is. It is an essential formality as required by the *donor* of the power; but it is only necessary because the *donor* demands it; 3 Atk. 161, *Ross v. Ewer*, 3 Atk. 156. It cannot have any other force, therefore, than that which he consents to give it; and it is evident that he did not intend that it should be equivalent to publication, since he has required that it should not only be signed and sealed, but published also. It has been held, indeed, that *delivery* is a publication, and in *Ward v. Swift*, 1 Cr. & M. 171, S. C. 3 Tyrwh. 122, signing, sealing, and deliver

ing was held to be virtually a publication, and therefore the attestation of signing, sealing, and delivering a virtual attestation of publication: but that case has no application here.

We are here to decide in conformity to a long series of adjudged cases; and it appears to me that the strong current of authorities, comprehending *Wright v. Wakeford*, 4 Taunt. 213; *Doe dem. Mansfield v. Peach*, 2 M. & S. 576; *Buller v. Burt*, (*a*) *Moodie v. Reid*, 7 Taunt. 355, 1 Mad. 516, (2 E. C. L. R. 133;) *Stanhope v. Keir*, 2 Sim. & St. 37; *Doe dem. Hutchkiss v. Pearce*, 6 Taunt. 402, (1 E. C. L. R. 427;) *Ward v. Swift*, 1 Cr. & M. 171, S. C. 3 Tyrwh. 122, to which may be added *Allen v. Bradshaw*, 1 Curt. 110, in which a very able and elaborate judgment was delivered in the Prerogative Court by Sir HERBERT JENNER in 1835,) are all in accordance with each other, nor do I find any one case militating against them.

Whether these decisions proceeded upon narrow grounds, and whether a more liberal construction would not have more effectually promoted the administration of justice, it is now too late to inquire. We are called upon "*jus dicere non jus dare*;" and, as I have ever thought that a *private* mischief should be endured rather than a *public inconvenience* which follows as a consequence from stretching the law beyond its natural tone in order to counteract the hardship of an individual case, I feel reluctantly compelled to declare my opinion that, in the present instance, there has been no sufficient attestation of the fact of publication; and, consequently, that the appointment is void, and that the judgment below should be reversed.

TINDAL, C. J. Upon the question arising on this special verdict, and upon which the Judges who heard the argument in this Court differ in opinion, the conclusion at which my mind has arrived is, that the power created by the settlement set out in the special verdict has been well executed by the testatrix, and that the judgment of the Court below ought to be affirmed.

In order to constitute a good execution of the power set forth in the verdict, the will must not only, in point of fact, have been "signed, sealed, and published in the presence of" three or more credible witnesses, but it must also have been *attested* by them; that is, it must appear from the signature of those witnesses to an express memorandum to that effect, at the foot or back of the will, or must be imported into such memorandum by necessary intendment from what is written on the will, that the witnesses were present at, and actually saw, the performance of those several requisites which, on the part of the donor of the power, have been required to be observed. No doubt exists, in this case, as to the *fact*: the special verdict expressly finds that all the requisites contained in the settlement by which the power is created were duly observed: the only question, therefore, for our consideration is whether the attestation by the three witnesses is sufficient or not.

The will in question, after it has completely finished all the testamentary appointments and bequests made therein, concludes thus, "I declare *this* only to be my last will and testament. In witness whereof I have to *this* my last will and testament, contained in one sheet, set my hand and seal, the 12th day of September, in the year of our Lord 1789. *Lydia Henning Skynner*, (L. s.)" And, very little below the last line of the will, and near to the signature of the testatrix, the word

(a) See *antè*, p. 333, note (a.)

‘witness’ is found to have been written, beneath which all the witnesses have subscribed their names.

Now it has not been contended that any particular form of publication of a will is necessary to satisfy such a requisition ; and undoubtedly it appears, so far as any authority can be found on the subject, that, if the testator openly declares in the presence of the witnesses that the paper, which the witnesses are called upon to attest, was his will, it is a sufficient publication. Supposing, therefore, that the declaration of the testatrix, at the conclusion of her will, can by law be considered as part of, and to be imported into, the memorandum which the witnesses signed, such declaration may be taken in itself to amount in law to a publication of the will.

In considering whether such construction may be made or not, I would first observe that the instrument itself appears to consist of two distinct parts ; first, of a will properly so called, containing appointments and testamentary bequests with which the will finishes ; next, and immediately following, but perfectly distinguishable from the former part, of a declaration in writing by the testatrix of the ceremonials observed by her touching the making of this will. When the testatrix says, “ I declare *this* only to be my last will and testament,” she must be taken to speak of so much of the written paper as has preceded this declaration, and which comprises her testamentary dispositions ; and, when she continues, “ In witness *whereof* I have to this my last will and testament” “ set my hand and seal,” she must, according to the plain and ordinary meaning of the words, be speaking of the same will : and, even if the word “ *whereof* ” is to be confined strictly to the declaration which has immediately preceded, it appears to me to make no real difference ; for there appears, on either supposition, a direct allegation upon the face of the will, by the testatrix herself, that she publishes her will, and that she signs and seals her will : she affirms, upon the face of the will, that she performs all three ceremonials : and, as the general word “ witness ” excludes nothing, the three witnesses, by putting their names under it, attest the performance of the publication, the signing, and the sealing of the will.

Against this mode of construction the first objection urged is, that the witnesses to a deed or will are not to be assumed to know the contents thereof.

It may be granted that such is the rule of law ; but the answer to this objection is, that they are not assumed to know the contents of the will, properly so called ; but only the allegations, contained at the end of it, of the ceremonials observed in its execution, allegations which must have been made in order that the witnesses should know them. In the case of *Buller v. Burt*, which was decided by Sir JOHN LEACH when Master of the Rolls, and has been often referred to in the course of the argument, no such objection was allowed ; on the contrary, the decision of that case turned expressly upon the reference made to the body of the deed. That learned judge says, “ it must follow that when the word, ‘ *witnesses*, ’ without more, is used in the attestation, it affirms that all has been done in the presence of the witnesses which is stated in the body of the deed.” In that case, in the body of the deed the only statement was, that it had been signed and sealed ; no statement was made that it had been delivered ; and it was upon that express ground held that, as the general word “ witnesses ” can affirm no more

than the deed states, there was not, in that case, any attestation of the delivery, and consequently that the power was not well executed.

In that case, the Master of the Rolls refers to the body of the deed to restrain the application of the word *witnesses* to the particular ceremonies mentioned in the deed, for the purpose of showing that the power had not been duly executed; and shall not a similar reference be made, in this case, for the purpose of setting up and supporting its execution?

The case, again, of *Moodie v. Reid*, 7 Taunt. 355, (2 E. C. L. R. 133,) is to the same effect, where the generality of the word *witness* was held to be restrained to an attestation of signature only, by reason of the word "signed," which occurs in the body of the will.

The case of *Stanhope v. Keir*, 2 Sim. & Stu. 37, was decided by Sir JOHN LEACH on the same principle, against the due execution of the power, though it seems very difficult to reconcile with his judgment in *Buller v. Burt*, what is reported to have fallen from him in *Stanhope v. Keir*, viz. "The argument for the defendant supposes the witnesses to be *acquainted with the contents of the will*. I cannot assume more from this attestation than that they saw Mrs. Keir sign the instrument."

Suppose, in the present case, instead of the word *witnesses*, written at the foot of the will, there had been written, by way of memorandum, the very same words which are found at the conclusion of the will itself, "Declared by the testatrix as her last will and testament; in witness whereof she has to this her last will and testament set her hand and seal." I think it must have been deemed beyond all doubt a sufficient attestation of the publishing, of the signing, and of the sealing, of that identical instrument; and I cannot make a sound distinction between such a case and the present, where the reference to the conclusion of the will itself must, according to the cases, be necessarily made.

Upon these grounds, I think the attestation sufficient, and that the judgment of the Queen's Bench is right, and ought to be affirmed.

The majority of this Court, however, is of opinion that the judgment ought to be reversed; and I may add that the two other learned Judges who heard this case argued, and who are no longer on the bench, were divided in opinion: the decision of this Court, therefore, would have been the same if they had been present.

Judgments reversed. (a)

(a) As to wills made on or after 1st January, 1838, see stat. 7 W. 4. & 1 Vict. c. 26, ss. 9, 10.

REGULA GENERALIS.

FORMS OF WRITS.—p. 986.

IT IS ORDERED, That the following forms of writs, framed by the Judges pursuant to the statute 1 & 2 Vict. c. 110, s. 20, be used from and after the first day of March next, with such alterations as the nature of the action, the description of the court in which the action is depending, the character of the parties, or the circumstances of the case may render necessary, but that any variance, not being in matter of substance, shall not affect the validity of the writs sued out.

No. I.

Writ of elegit upon a judgment in the Court of Queen's Bench, in an action of assumpsit.

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the sheriff of —, greeting. Whereas A. B., lately in our court before us at Westminster, by the judgment of the same court recovered against C. D. £—, which, in our said court before us, were adjudged to the said A. B. for his damages which he had sustained, as well on occasion of the not performing of certain promises and undertakings then lately made by the said C. D. to the said A. B., as for his costs and charges by him about his suit in that behalf expended, whereof the said C. D. is convicted, as appears to us of record, and afterwards the said A. B. came into our said court before us, and, according to the form of the statutes in such case made and provided, chose to be delivered to him all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D., or any person in trust for him, was seised or possessed of on the — day of —, in the year of our Lord —, on which day the judgment aforesaid was entered up, or at any time afterwards, or over which the said C. D. on the said — day of —, (a) or at any time afterwards, had any disposing power which he might, without the assent of any other person, exercise for his own benefit, to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, according to the form of the said statutes, until the damages aforesaid, together with interest upon the said sum of £—, at the rate of £4 *per centum* per annum, from the — day of —, in the year of our Lord —, (b) shall have been levied. Therefore we command you that without delay you cause to be delivered to the said A. B., by a reasonable price and extent, all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D., or any person in trust for him, was seised or possessed of on the said — day of —, (a) or at any time afterwards, or over which the said C. D. on the said — day of —, (a) or at any time afterwards, had any disposing power which he might, without the assent of any other person, exercise for his own benefit, to hold the said goods and chattels to the said A. B. as his proper goods and chattels; and also to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the damages aforesaid, together with interest as aforesaid, shall have been levied. And in

(a) The day on which the judgment was entered up.

(b) The day on which the judgment was entered up; or, in case the judgment was entered up prior to the 1st of October, 1838, say from the 1st day of October, in the year of our Lord 1838.

what manner you shall have executed this our writ, make appear to us at Westminster, immediately after the execution thereof, under your seal, and the seals of those by whose oath you shall make the said extent and appraisement, and have there then this writ.

Witness, Thomas Lord DENMAN, at Westminster, the — day of —, in the year of our Lord —.

No. II.

Writ of elegit on a rule made in the Court of Queen's Bench for payment of money.

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the sheriff of —, greeting. Whereas lately in our court before us at Westminster, by a rule of the said court entitled, &c., [*as the case may be*], the sum of £— was, by the said court, ordered to be paid by C. D. to A. B., and afterwards the said A. B. came into our said court before us, and, according to the form of the statute in such case made and provided, chose to be delivered to him all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D., or any person in trust for him, was seised or possessed of on the — day of —, in the year of our Lord —, on which day the said rule was made, or at any time afterwards, or over which the said C. D. on the said — day of —, (a) or at any time afterwards, had any disposing power which he might, without the assent of any other person, exercise for his own benefit, to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said sum of £—, together with interest upon the said sum of £—, at the rate of £4 per centum per annum, from the said — day of —, in the year of our Lord —, (b) shall have been levied. Therefore we command you that without delay you cause to be delivered to the said A. B., by a reasonable price and extent, all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D., or any person in trust for him, was seised or possessed of on the said — day of —, (a) or at any time afterwards, or over which the said C. D. on the said — day of —, (a) or at any time afterwards, had any disposing power which he might, without the assent of any other person, exercise for his own benefit, to hold the said goods and chattels to the said A. B. as his proper goods and chattels, and also to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said sum of £—, together with interest as aforesaid, shall have been levied. And in what manner you shall have executed this our writ, make appear to us at Westminster, immediately after the execution thereof, under your seal, and the seals of those by whose oath you shall make the said extent and appraisement, and have there then this writ.

Witness, Thomas Lord DENMAN, at Westminster, the — day of —, in the year of our Lord —.

No. III.

Writ of elegit on a rule made in the Court of Queen's Bench for payment of money and costs.

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the sheriff of —, greeting. Whereas, lately in our court before us at Westminster, by a rule of the said court, entitled, &c., [*as the case may be*], the sum of £— was, by the said court, ordered to be paid by C. D. to A. B., together with the costs of the said rule, which said costs were afterwards, on the — day of —, taxed and allowed by our said court at the sum of £—. And afterwards the said A. B. came into our said court before us, and, according to the form of the statute in such case made and provided, chose to be delivered to him all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D., or any one in trust for him, was seised or possessed of on the — day of —, in the year of our Lord —, (c) or at any time afterwards, or over which the said C. D. on the said —

(a) The day on which the rule was made.

(b) The day on which the rule was made; or, in case it was made prior to the 1st of October, 1838, say from the 1st day of October, in the year of our Lord 1838.

(c) The day on which the costs of the rule were taxed.

day of —, (a) or at any time afterwards, had any disposing power which he might, without the assent of any other person, exercise for his own benefit, to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said two several sums of £— and £—, together with interest upon the said two several sums of £— and £—, at the rate of £4 *per centum* per annum, from the said — day of —, (b) shall have been levied. Therefore we command you that without delay you cause to be delivered to the said A. B. by a reasonable price and extent, all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D., or any person in trust for him, was seised or possessed of on the said — day of —, (a) or at any time afterwards, or over which the said C. D. on the said — day of —, (a) or at any time afterwards, had any disposing power which he might, without the assent of any other person, exercise for his own benefit, to hold the said goods and chattels to the said A. B. as his proper goods and chattels; and also to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said two several sums of £— and £—, together with interest as aforesaid, shall have been levied. And in what manner you shall have executed this our writ, make appear to us at Westminster, immediately after the execution thereof, under your seal, and the seals of those by whose oath you shall make the said extent and appraisement, and have there then this writ.

Witness, Thomas Lord DENMAN, at Westminster, the — day of —, in the year of our Lord —.

No. IV.

Writ of elegit on a judgment of an inferior court in an action of *assumpsit* removed into the Court of Queen's Bench.

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the sheriff of —, greeting. Whereas A. B., lately in [*insert the style of the court*], by the judgment of the said court, recovered against C. D. the sum of £—, which, in the said court, were adjudged to the said A. B. for his damages which he had sustained, as well on occasion of the not performing of certain promises and undertakings then lately made by the said C. D. to the said A. B., as for his costs and charges by him about his suit in that behalf expended, whereof the said C. D. is convicted, as appears to us of record. And, whereas the said judgment was afterwards, on the — day of —, in the year of our Lord, removed into our court before us at Westminster, by virtue of an order of our said court before us at Westminster [*or of —, one of the Justices of our said court before us at Westminster, as the case may be*], in pursuance of the statute in that case made and provided, and the costs attendant upon the application for the said order and upon the said removal were afterwards, on the — day of —, in the year of our Lord —, taxed and allowed by our said court before us at Westminster at the sum of £—; and afterwards the said A. B. came into our said court before us at Westminster, and, according to the form of the statute in such case made and provided, chose to be delivered to him all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D., or any person in trust for him, was seised or possessed of on the said — day of —, in the year of our Lord — aforesaid, (c) or at any time afterwards, or over which the said C. D. on the said — day of —, (c) or at any time afterwards, had any disposing power which he might, without the assent of any other person, exercise for his own benefit, to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the damages aforesaid and the said costs so taxed and allowed by our said court before us at Westminster as aforesaid, together with interest upon the said two several sums of £— and £—, at the rate of £4 *per centum* per annum, from the — day of — aforesaid, (c) shall have been levied. Therefore we command you that without delay you cause to be delivered to the said A. B., by a reasonable price and extent, all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories,

(a) The day on which the costs of the rule were taxed.

(b) The day on which the costs of the rule were taxed; or, in case that day were prior to the 1st of October, 1838, say from the 1st day of October, in the year of our Lord 1838.

(c) The day on which the costs of removing the judgment were taxed.

tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D., or any one in trust for him, was seised or possessed of on the said — day of —, (a) or at any time afterwards, or over which the said C. D. on the said — day of —, (a) or at any time afterwards, had any disposing power which he might, without the assent of any other person, exercise for his own benefit, to hold the said goods and chattels to the said A. B. as his proper goods and chattels; and also to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the damages aforesaid, and the said costs so taxed and allowed by our said court before us at Westminster as aforesaid, and interest as aforesaid, shall have been levied. And in what manner you shall have executed this our writ, make appear to us at Westminster, immediately after the execution thereof, under your seal, and the seals of those by whose oath you shall make the said extent and appraisement, and have there then this writ.

Witness, THOMAS Lord DENMAN, at Westminster, the — day of —, in the year of our Lord —.

No. V.

Writ of elegit on an order for payment of money made in an inferior court and removed into the Court of Queen's Bench.

VICTORIA, &c., to the sheriff of —, greeting. Whereas lately in [insert the style of the court], by a rule of the said court, entitled, &c., [as the case may be], the sum of £— were by the said court ordered to be paid by C. D. to A. B., and whereas the said rule was afterwards, on the — day of —, in the year of our Lord —, removed into our court before us at Westminster, by virtue of an order of our said court before us at Westminster [or of —, one of the Justices of our said court before us at Westminster, as the case may be], in pursuance of the statute in that case made and provided, and the costs attendant upon the application for the said last-mentioned order and upon the said removal were afterwards, on the — day of —, in the year of our Lord —, taxed and allowed in our said court before us at Westminster at the sum of £—, and afterwards the said A. B. came into our said court before us at Westminster, and, according to the form of the statute in such case made and provided, chose to be delivered to him all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D., or any person in trust for him, was seised or possessed of on the said — day of —, in the year of our Lord —, (b) or at any time afterwards, or over which the said C. D. on the said — day of —, (b) or at any time afterwards, had any disposing power which he might, without the assent of any other person, exercise for his own benefit, to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said two several sums of £— and £—, together with interest on the said two several sums of £— and £—, at the rate of £4 per centum per annum, from the said — day of —, (b) shall have been levied. Therefore we command you that without delay you cause to be delivered to the said A. B., by a reasonable price and extent, all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D., or any one in trust for him, was seised or possessed of on the said — day of —, (b) or at any time afterwards, or over which the said C. D. on the — day of —, (b) or at any time afterwards, had any disposing power which he might, without the assent of any other person, exercise for his own benefit, to hold the said goods and chattels to the said A. B. as his proper goods and chattels, and also to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said two several sums of £— and £—, together with interest as aforesaid, shall have been levied. And in what manner you shall have executed this our writ, make appear to us at Westminster, immediately after the execution thereof, under your seal, and the seals of those by whose oath you shall make the said extent and appraisement, and have you there then this writ.

Witness, THOMAS Lord DENMAN, at Westminster, the — day of —, in the year of our Lord —.

(a) The day on which the costs of removing the judgment were taxed.

(a) The day on which the costs of removing the rule of the inferior court into the Court of Queen's Bench were taxed.

No. VI.

Writ of elegit on a rule for payment of money and costs made in an inferior court and removed into Queen's Bench.

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the sheriff of —, greeting. Whereas lately in [*insert the style of the court*], by a rule of the said court, entitled, &c. [*as the case may be*], the sum of £— was, by the said court, ordered to be paid by C. D. to A. B., together with the costs of the said rule, which said costs were afterwards, on the — day of —, in the year of our Lord —, taxed and allowed by the said court, at the sum of £—, and whereas the said rule was afterwards, on the — day of —, in the year of our Lord —, removed into our court before us at Westminster, by virtue of an order of our said court before us at Westminster [*or of —, one of the Justices of our said court before us at Westminster, as the case may be*], in pursuance of the statute in that case made and provided, and the costs and charges attendant upon the application for the said last-mentioned order, and upon the said removal, were afterwards, on the — day of —, in the year of our Lord —, taxed and allowed in our said court before us at the sum of £—; and afterwards the said A. B. came into our said court before us at Westminster, and, according to the form of the statute in such case made and provided, chose to be delivered to him all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D., or any person in trust for him, was seised or possessed of on the said — day of —, (a) or at any time afterwards, or over which the said C. D. on the said — day of —, (a) or at any time afterwards, had any disposing power which he might, without the assent of any other person, exercise for his own benefit, to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said three several sums of £—, and £—, and £—, together with interest upon the said three several sums of £—, and £—, and £—, at the rate of £4 per centum per annum, from the said — day of —, (a) shall have been levied. Therefore we command you that without delay you cause to be delivered to the said A. B., by a reasonable price and extent, all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D., or any person in trust for him, was seised or possessed of on the said — day of —, (a) or at any time afterwards, or over which the said C. D. on the said — day of —, (a) or at any time afterwards, had any disposing power which he might, without the assent of any other person, exercise for his own benefit, to hold the said goods and chattels to the said A. B. as his proper goods and chattels, and also to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said three several sums of £—, and £—, and £—, together with interest as aforesaid, shall have been levied. And in what manner you shall have executed this our writ, make appear to us at Westminster, immediately after the execution thereof, under your seal, and the seals of those by whose oath you shall make the said extent and appraisement, and have there then this writ.

Witness, THOMAS LORD DENMAN, at Westminster, the — day of —, in the year of our Lord —.

No. VII.

Writ of fieri facias on a judgment in the Court of Queen's Bench in an action of *assumpsit*.

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the sheriff of —, greeting. We command you that of the goods and chattels of C. D. in your bailiwick you cause to be made £— which A. B. lately, in our Court before us at Westminster, recovered against him for his damages which he had sustained, as well on occasion of the not performing certain promises and undertakings then lately made by the said C. D. to the said A. B. as for his costs and charges by him about his suit in that behalf expended, whereof the said C. D. is convicted, as appears to us of record, together with interest upon the said sum of £—, at the rate of £4 per centum per annum, from the — day of —, in the year of our Lord —, (b)

(a) The day on which the costs of removing the rule of the inferior court into the Court of Queen's Bench were taxed.

(b) The day on which the judgment was entered up; or, if entered up prior to the 1st of October, 1838, say from the 1st day of October, in the year of our Lord 1838, omitting the words "on which day the judgment aforesaid was entered up."

on which day the judgment aforesaid was entered up, and have that money with such interest as aforesaid before us at Westminster, immediately after the execution hereof, to be rendered to the said A. B. for his damages and interest as aforesaid, and that you do all such things as by the statute passed in the second year of our reign you are authorized and required to do in this behalf. And in what manner you shall have executed this our writ make appear to us at Westminster, immediately after the execution thereof, and have there then this writ.

Witness, THOMAS Lord DENMAN, at Westminster, on the — day of —, in the year of our Lord —.

No. VIII.

Writ of fieri facias on an order of the Court of Queen's Bench, for payment of money.

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the sheriff of —, greeting. We command you, that of the goods and chattels of C. D. in your bailiwick you cause to be made £—, which lately, in our court before us at Westminster, by a rule of our said court, entitled, &c. [as the case may be], were by the said court ordered to be paid by the said C. D. to A. B., and that of the said goods and chattels of the said C. D. in your bailiwick you further cause to be made interest upon the said sum of £—, at the rate of £4 per centum per annum from the — day of —, in the year of our Lord —, (a) on which day the said rule was made, and have that money, together with such interest as aforesaid, before us at Westminster, immediately after the execution hereof, to be rendered to the said A. B. for the said sum of money so ordered to be paid by the said C. D. to the said A. B., and for interest as aforesaid, and that you do all such things as by the statute passed in the second year of our reign you are authorized and required to do in this behalf. And in what manner you shall have executed this our writ make appear to us at Westminster, immediately after the execution thereof, and have there then this writ.

Witness, THOMAS Lord DENMAN, at Westminster, on the — day of —, in the year of our Lord —.

No. IX.

Writ of fieri facias on an order of the Court of Queen's Bench, for payment of money and costs.

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the sheriff of —, greeting. We command you that of the goods and chattels of C. D. in your bailiwick you cause to be made £—, which lately, in our court before us at Westminster, by a rule of our said court, entitled, &c., [as the case may be], were by the said court ordered to be paid by the said C. D. to A. B., together with the costs of the said rule, which said costs were afterwards, on the — day of —, in the year of our Lord —, taxed and allowed by our said court, at the sum of £—, and that of the said goods and chattels of the said C. D. in your bailiwick you further cause to be made interest upon the said two several sums of £— and £—, at the rate of £4 per centum per annum, from the said — day of —, in the year of our Lord —, (b) and have that money, together with such interest as aforesaid, before us at Westminster, immediately after the execution hereof, to be rendered to the said A. B. for the said sum of money so ordered to be paid by the said C. D. to the said A. B. and for costs and interest as aforesaid, and that you do all such things as by the statute passed in the second year of our reign you are authorized and required to do in this behalf. And in what manner you shall have executed this our writ make appear to us at Westminster, immediately after the execution thereof, and have there then this writ.

Witness, THOMAS Lord DENMAN, at Westminster, the — day of —, in the year of our Lord —.

No. X.

Writ of fieri facias on a judgment of an inferior Court in an action of assumpsit, removed into the Court of Queen's Bench.

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the sheriff of —, greeting. We command you that of the goods and chattels of C. D. in your bailiwick, you cause to be made £—, which

(a) The day on which the rule was made; or, if it were made prior to the 1st of October, 1838, say from the 1st day of October, in the year of our Lord 1838, omitting the words "on which day the said rule was made."

(b) The day on which the costs of the rule were taxed; or, if that were prior to the 1st of October, 1838, say from the 1st day of October, in the year of our Lord 1838.

A. B. lately, in [*insert the style of the court*], by the judgment of the said court, recovered against the said C. D. for his damages which he had sustained, as well on occasion of the not performing certain promises and undertakings then lately made by the said C. D. to the said A. B., as for his costs and charges by him about his suit in that behalf expended, whereof the said C. D. is convicted, as appears to us of record, and which judgment was afterwards, on the — day of —, in the year of our Lord —, removed into our court before us at Westminster, by virtue of an order of our said court before us at Westminster [*or of — one of the Justices of our said court before us at Westminster, as the case may be*], in pursuance of the statute in such case made and provided, and the costs attendant upon the application for the said order, and upon the said removal, were, on the — day of —, in the year of our Lord —, taxed and allowed by our said court before us at Westminster at the sum of £—. And we further command you that of the said goods and chattels of the said C. D. in your bailiwick you further cause to be made the said sum of £—, (a) together with interest on the said two several sums of £— and £—, at the rate of £4 *per centum* per annum, from the said — day of —, in the year of our Lord —; (b) and that you have that money, with such interest as aforesaid, before us at Westminster, immediately after the execution hereof, to be rendered to the said A. B. for his damages aforesaid, and for costs and interest as aforesaid; and that you do all such things as by the statute passed in the second year of our reign you are authorized and required to do in this behalf. And in what manner you shall have executed this our writ make appear to us at Westminster, immediately after the execution thereof, and have there then this writ.

Witness, THOMAS Lord DENMAN, at Westminster, on the — day of —, in the year of our Lord —.

No. XI.

Writ of fieri facias on an order for payment of money made in an inferior court, and removed into the Court of Queen's Bench.

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the sheriff of —, greeting. We command you, that of the goods and chattels of C. D. in your bailiwick you cause to be made £— which lately in [*insert the style of the court*], by a rule of the said court, entitled, &c., [*as the case may be*], were by the said court ordered to be paid by the said C. D. to A. B., and which rule was afterwards, on the — day of —, in the year of our Lord —, removed into our court before us at Westminster, by virtue of an order of our said court before us at Westminster [*or of —, one of the Justices of our said court before us at Westminster, as the case may be*], in pursuance of the statute in that case made and provided, and the costs attendant upon the application for the said last-mentioned order and upon the said removal, were, on the — day of —, in the year of our Lord —, taxed and allowed by our said court before us at Westminster at the sum of £—. And we further command you, that of the said goods and chattels of the said C. D. in your bailiwick you further cause to be made the said sum of £—, (c) together with interest on the said two several sums of £— and £—, at the rate of £4 *per centum* per annum, from the said — day of —, (d) and that you have that money, with such interest as aforesaid, before us at Westminster, immediately after the execution hereof, to be rendered to the said A. B. for the said moneys by the said rule first above mentioned ordered to be paid by the said C. D. to the said A. B., and for costs and interest as aforesaid; and that you do all such things as by the statute passed in the second year of our reign you are authorized and required to do in this behalf. And in what manner you shall have executed this our writ make appear to us at Westminster, immediately after the execution thereof, and have there then this writ.

Witness, THOMAS Lord DENMAN, at Westminster, on the — day of —, in the year of our Lord —.

No. XII.

Writ of fieri facias on an order for payment of money and costs made in an inferior court and removed into the Court of Queen's Bench.

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland

(a) The costs attendant upon the removal of the judgment out of the inferior court into the Court of Queen's Bench.

(b) The day on which the costs of removal were taxed.

(c) The costs of removing the rule of the inferior court into the Court of Queen's Bench.

(d) The day on which the costs of removing the rule of the inferior court into the Court of Queen's Bench were taxed.

Queen, Defender of the Faith, to the sheriff of —, greeting. We command you that of the goods and chattels of C. D. in your bailiwick you cause to be made £—, which lately in [*insert the style of the court*], by a rule of the said court, entitled, &c., [*as the case may be*], were by the said court ordered to be paid by the said C. D. to A. B., and also £— for the costs of the said rule by the said court also ordered to be paid by the said C. D. to the said A. B., which said rule was afterwards, on the — day of —, in the year of our Lord —, removed into our court before us at Westminster, by an order of our said court before us at Westminster, [*or of —, one of the Justices of our said court before us at Westminster, as the case may be*], in pursuance of the statute in such case made and provided, and the costs attendant upon the application for the said last-mentioned order and upon the said removal were, on the — day of —, in the year of our Lord —, taxed and allowed by our said court before us at Westminster at the sum of £—. And we further command you, that of the said goods and chattels of the said C. D. in your bailiwick you further cause to be made the said sum of £—, (a) together with the interest on the said three several sums of £—, and £—, and £—, at the rate of £4 *per centum* per annum, from the said — day of —, in the year of our Lord —, (b) and that you have that money, with such interest as aforesaid, before us at Westminster immediately after the execution hereof, to be rendered to the said A. B. for the moneys by the said rule first above mentioned ordered to be paid by the said C. D. to the said A. B. and for costs and interest as aforesaid, and that you do all such things as by the statute passed in the second year of our reign you are authorized and required to do in this behalf. And in what manner you shall have executed this our writ, make appear to us at Westminster, immediately after the execution thereof, and have there then this writ.

Witness, THOMAS LORD DENMAN, at Westminster, on the — day of —, in the year of our Lord —.

DENMAN.
N. C. TINDAL.
ABINGER.
J. LITLEDALM.
J. VAUGHAN.
J. PARKE.
J. B. BOSANQUET.

E. H. ALDERSON.
J. PATTESON.
J. GURNEY.
J. WILLIAMS.
J. T. COLERIDGE.
T. COLTMAN.
T. ERSKINE.

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(b) The day on which the costs of removing the rule from the inferior court into the Court of Queen's Bench were taxed.

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Plaintiff, by letter, desired his agent to
receive a sum of money for him, and, after
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plus through the house of defendants, a mer-
cantile firm in London, to be placed to the
plaintiff's credit at Calcutta. The agent paid
in the surplus, 419*l*., at defendants' house,
showing them plaintiff's letter. Defendants
received the sum on plaintiff's account,
entered it in their books to the account of
C. and Co., their correspondents at Calcutta,
and wrote to C. and Co., informing them that
they had so done, and desiring that C. and
Co. would account with plaintiff, at the rate
of so much per rupee. Defendants charged

one per cent. commission. Before the letter from defendants arrived at Calcutta, C. and Co. stopped payment. Defendants, after placing the 419*l.* to account, paid bills drawn on them by C. and Co., to a much larger amount; but it did not appear whether or not the general balance between the two houses was altered by such payments:

On assumption brought against the defendants for money had and received, and plea, as to the 419*l.*, that defendants had remitted it as desired,

Held, that defendants were not liable, having done all that plaintiff required of them, and they contracted to do, for the purpose of remitting the 419*l.*; and having bound themselves to credit C. and Co. in that amount, if that house did not reject the transaction. *McCarthy v. Colvin*, 607

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An award was set aside on motion, it appearing by the affidavits that a communication was made as above, and the choice assented to; but it not appearing whether the parties assenting (and one of whom now objected) knew, at the time of such assent, how the appointment had taken place. *In re Greenwood and Titterton*, 699

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The arbitrator directed that a verdict should be entered for the plaintiffs at law, with damages, on some issues in the cause, and for the defendants on the others: but he ordered that no execution should be taken out by the plaintiffs; and that, after entering of the verdict as above, and any judgment thereon, all proceedings on the judgment by either party to the action should be stayed. But for such direction the verdict would have entitled the plaintiffs to the general costs. He also directed that the suit in equity should cease.

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A canal company agreed with B. for the use of an engine constructed by him, during a term of years, they paying a stipulated annual sum. In the course of the term, disputes arising, the parties put an end to the agreement, and referred all matters in difference between them to arbitration. On the reference, B. claimed, among other things, compensation for future loss, in respect of the part of the term unexpired. The company stated a set-off. The arbitrators, by their award, reciting the submission to arbitration, and that they had heard and considered all the evidence of each party, and investigated all the accounts and vouchers touching the matters in difference, adjudicated (not saying that they did so of and concerning the matters referred) that there was due from the company to B. 515l., which they directed the company to pay him.

On motion to set aside the award, on the grounds, 1. That it was not final, inasmuch as no decision appeared touching the future damage, 2. That it was uncertain, 3. That it left a doubt whether or not the set-off had been considered.

Held, that the award was sufficient. *Id re Brown and the Croydon Canal Company*, 522

XI. Effect of award.

1. Of order obtained in amicable suit, 255. STATUTE, XXIII.
2. Of general award on specific differences, 522. Ante, X.

ARREST.

- I. By wrong name, 840. MISNOMER, I.
- II. Remedy for malicious arrest.

An action on the case lies for *maliciously*, and without reasonable or probable cause, arresting plaintiff, and detaining him until discharged by a judge's order, pending a former suit by defendant for the same cause of action, in which plaintiff had been arrested

and discharged out of custody by reason of defendant's delay in declaring.

To such action it is no defence that the second suit is still pending; and, *semble*, the action lies, although the party arresting had a good cause of action. *Quere*, whether it lies where the defendant obtained a judge's order for the second arrest? *Heywood v. Collinge*, 268

III. Second, 268. Ante, II.

IV. Pleading, 268. Ante, II.

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- I. Under bankruptcy. BANKRUPT, III. to V.
- II. Of chose in action.
 1. Effect of bankruptcy of assignor, 292. Bond, I. 1.
 2. Of funds in hands of consignee, 375. BANKRUPT, I. 1.
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 4. Of stipend, &c., by bishop, 468. JUSTICE, I.

ASSISTANT OVERSEER.

P. 911. Poor, I. 2.

ASSUMPSIT.

I. Where it lies.

Not as well as covenant.

Where a lessee assigns and grants over his lease by deed, not containing a covenant for quiet enjoyment, or for indemnity against demands of rent due to the superior landlord before assignment, the assignee, if distrained upon for such rent, may bring an action of covenant against the assignor, founded on the word "grant" in the deed.

And consequently, if, upon such distress, he has paid the rent to release his own goods, he cannot sue the assignor in assumpsit for the amount paid.

Although the assignor, after such distress and payment, has promised the plaintiff to repay him the amount: at least if there be not a new consideration for such promise; as forbearance. *Baber v. Harris*, 532

II. Money had and received.

1. By way of deposit, 508. VENDOR, I. 1.
2. For purpose of remitting, 607. AGENT, III. 2.

III. Money paid.

By assignee to release his goods from distress by lessor, 532. Ante, I.

IV. Pleading.

1. Plea of payment of all sums mentioned in a declaration admitting part payment, and new assignment thereon, 248. PAYMENT, V. 3.
2. New promise, 854. BILLS, VII. 1.
3. Interlineation, 926. INTERLINEATION, I. 1.

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ATTAINDER.

Pp. 731, 784. **HABEAS CORPUS, I.**

ATTESTATION.

Of exercise of power, 936. **POWER, I.**

ATTORNEY.

I. Examination.

1. Notice.

A candidate for admission to practise as an attorney having failed, on examination, to satisfy the Examiners, the Court, under particular circumstances, made an order, that, if, on re-examination in the next term, he should obtain his certificate, he might be admitted without having given a fresh term's notice under Reg. Gen. Hil. 6 W. 4, s. 4. *In re Examiners of Attorneys,* 728

2. Failure, 728. **ANTE, I.**

II. Retainer.

By agent, 314. **SHIPPING, I. 1.**

III. Delivery of bill as against third parties.

When it is not a cause of action under a contract to indemnify, 633. **INDEMNITY, I.**

IV. Personal liability.

When not ordered to pay costs of criminal information, 704. **TRESPASS, IV. 1.**

ATTORMENT.

I. By wharfinger to vendee, 895. **VENDOR, II. 5.**

II. By tenant, 342. **MORTGAGE, II. 1.**

AUGMENTATION.

Of living by Queen Anne's bounty, 556. **CURATE, III.**

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I. To receive colonial convicts, 731, 786. **HABEAS CORPUS, I.**

II. Of gamekeeper, 654. **GAME.**

III. Revocation by bankruptcy, 375. **BANKRUPT, I. 1.**

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AVOWRY.

By mortgagee, 342. **MORTGAGE, II. 1.**

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I. Of writ of sequestration, 468. **JUSTICE, I.**

II. Under arbitration. **ARBITRATION.**

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Liability of sheriff for, 288. **SHERIFF, III.**

BALANCE.

Pleading to the, 245, 248. **PAYMENT, V. 2, 3**

BANKER.

P. 371. **BANKRUPT, I. 1.**

BANKRUPT.

I. Effect of bankruptcy.

1. As a revocation.

H., as a manufacturer, had been accustomed to consign goods by the agency of O. and Co., commission merchants, to houses in America, for sale on H.'s account. O. and Co. made advances to H. on the consignments, received the proceeds as his agents, and accounted to him, repaying themselves their commission, advances, and other charges. In 1831, H. being indebted to O. and Co. for such advances and charges, and likewise owing 5000*l.* to his own bankers, wrote to O. and Co., authorizing them, after paying themselves their balance out of the net proceeds of H.'s shipments down to that date, to pay R. and Co., the bankers, half the remainder of such proceeds, so that the payment should not exceed 5000*l.* O. and Co. thereupon wrote to R. and Co., stating that they, agreeably to H.'s authority, engaged to pay R. and Co. (after liquidating their own balance) a proportion of the remaining proceeds, &c. (as in H.'s letter), in consideration of R. and Co. guaranteeing O. and Co. from claims by any other party in consequence of such payment. R. and Co. then wrote to O. and Co. that, understanding from H. that O. and Co. had agreed to pay any surplus balance, &c. (as in H.'s letter), they, R. and Co., agreed to guarantee O. and Co. against such other claims. A few days before this correspondence, H. had transmitted to O. and Co. a letter of authority resembling that afterwards sent, and had seen a draft of a letter from them to R. and Co., like that afterwards sent by O. and Co. to R. and Co., claiming a guarantee as above: but this first authority was revoked, and never acted upon. In 1833 H. became bankrupt. The assignees gave O. and Co. notice not to make any payments out of H.'s effects, except to them. Afterwards O. and Co. received proceeds of sales from the houses abroad, and paid them over to R. and Co. according to the authority given by H. The assignees sued O. and Co. for the amount as money had and received to their use: Held,

1. That the letter of H., acted upon by O. and Co., did not need a bill stamp under stat. 55 G. 3, c. 184, sched. part 1, tit. Inland Bill, since it neither required payment to bearer or order, nor was delivered to the payee or any person on his behalf. For

The schedule means a delivery either personally to the payee, or to his agent or representative, and not to the person on whom the order is made.

2. That, if the letter had been so delivered, the sum payable was sufficiently specified or ascertainable to bring it within the schedule as an order for payment of money out of a

particular fund which may or may not be available, &c.

3. That the transaction between H., O. and Co., and R. and Co., was either a valid appropriation, or equitable assignment, of funds to the amount of 5000*l.* in favour of R. and Co., and was not revoked by H.'s bankruptcy. *Hutchinson v. Heyworth*, 375

2. Effect of bankruptcy of obligee after assignment of bond by way of further security, 292. **BOND**, I. 1.

II. Relation to act of bankruptcy.

1. Pleading with reference to, 303. **PLEADING**, XXIV. 1.

2. Bona fide purchase two months before fiat, 303. **PLEADING**, XXIV. 1.

III. Assignees, generally.

Notice of revocation by, 375. *Ante*, I. 1.

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Effect in evidence of receipt fraudulently signed by bankrupt, 641. **RECEIPT**.

V. What passes under the assignment.

Not bond previously assigned to a creditor, 292. **BOND**, I. 1.

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Plea of puis darrrein continuance, 505. **COSTS**, III.

VII. Pleading.

1. Under 6 G. 4, c. 16, s. 81, 303. **PLEADING**, XXIV. 1.

2. Plea of bankruptcy of plaintiff obligee: replication, previous assignment to a creditor, for whose benefit, &c., 292. **BOND**, I. 1.

BARON AND FEME.

I. Separation.

1. By imprisonment, 622. **POOR**, VIII.

2. By order of removal, 622. **POOR**, VIII.

II. Action against baron for feme's debt.

Effect of feme's discharge under Insolvent Act, 868. **INSOLVENT**, II.

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Filiation, 619. **POOR**, XVI. 1.

BENEFICE.

I. Perpetual curacy, when, 556. **CURATE**, III.

II. As a qualification for a justice, 468. **JUSTICE**, I.

III. Sequestration, 468. **JUSTICE**, I.

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I. Attorney's. **ATTORNEY**, III.

II. Of lading. **SHIPPING**, I.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

I. What is a bill or note.

1. Order for payment of money, when, 375. **BANKRUPT**, I. 1.

2. Note on demand, 275. **POST**, III.

3. Joint and several, 854. **POST**, VII. 1.

II. Stamp, 375. **BANKRUPT**, I. 1.

III. Reissuing.

A note payable to A. or order on demand

cannot be reissued after payment by the maker.

In an action by the holder against the payee of such a note for 200*l.*, the plea averred that the defendant endorsed it at the request and for the accommodation of the maker, for the sole purpose of depositing it with B. as security for a debt of 200*l.* due from the maker to B.; that the maker afterwards paid the debt to B., who thereupon redelivered the note to the maker: Held, on general demurrer, that the above statement was in effect an averment that the note had been paid by the maker: and therefore that the plea disclosed a sufficient defence.

Quære, whether the endorsee of an overdue note, payable on demand, be affected by its previous equities, unless he had notice that it was overdue? *Bartrum v. Caddy*, 275

IV. Overdue, 275. *Ante*, III.

V. Endorsee.

Receiving a note when overdue, 275. *Ante*, III.

VI. Notice.

Of note being overdue, 275. *Ante*, III.

VII. Release to one of several parties liable.

1. To one of several joint-makers.

Assumpsit by endorsee against the maker of a promissory note. Plea, that the promise was a joint and several one by defendant and A., to whom one of the plaintiffs executed a release under seal. Replication, that the release was executed at the request of defendant, who afterwards, and while the note was unpaid, in consideration of such release, ratified his promise, and promised to remain liable to plaintiff for the amount of the note. Held bad, because it set up a parol exception to a release under seal.

To the same plea, pleaded to the common money counts, a replication traversing both the joint and several promise, and also the release, was admitted to be bad on special demurrer. *Brooke v. Stuart*, 854

2. Reservation of liability as to one, 854. *Ante*, I.

VIII. Pleading.

Payment by party primarily liable, 275. *Ante*, III.

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I. His consent when necessary to a lease, 556. **CURATE**, III.

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I. For superintendence of highways, 820. **HIGHWAY**, I.

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I. Bona fide supposition of right, 654. **GAME**. 268. **ARREST**, II.

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BOND.

I. Assignment of.

1. Effect of bankruptcy of obligee.

Debt on bond. Plea: bankruptcy of plaintiff, fiat, &c., concluding that, "by reason of the premises, the assignees became entitled to the debt and cause of action." Held, that the latter allegation was not traversable.

The replication stated that plaintiff had, by indenture before his bankruptcy, assigned the bond to G. and E. as a security for a larger debt, and that the action was prosecuted for their benefit: Held, that no profit of the indenture was necessary.

A money bond, assigned by the obligee to creditors to secure a debt of larger amount, does not pass to assignees under a fiat against him, although the assignment is expressed to be "for further security," and contains a proviso to defeat it on payment of the debt. *Dangerfield v. Thomas*, 292

2. By way of mortgage, 292. Ante, 1.

II. Pleading, 292. Ante, I. 1.

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BOROUGH-RATE.

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I. By both parties, effect as to deposit, 508. VENDOR, I. 1.

II. Of contract to indemnify, 633. INDEMNITY, I.

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I. To which agreement a stamp is applicable, 314, 331. SHIPPING, I. 1.

II. Of sum appropriated or assigned, 325. BANKRUPT, I. 1.

III. In awards. ARBITRATION, VI.

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I. For costs where less than 20*l.* recovered, 702. COSTS, IV.

II. Of bankrupt, 505. COSTS, III.

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I. To bring up orders of poor-law commissioners, 901, 911. POOR, I.

II. To bring up a rate.

1. When not allowed.

On appeal at quarter sessions against a county rate, the sessions, in 1837, dismissed the appeal, subject to the opinion of this Court on a case. The case directed that, if this Court should think the appellants entitled to relief on the objection taken, the rate should be amended in a particular which was specified. A certiorari was obtained, to remove into this Court the order of sessions, with all things touching the same. The sessions sent up the order and special case, but not the rate. This Court quashed the order. At the ensuing sessions, December 1838, a motion was made to quash the rate; but the justices refused. No continuances had been entered on the appeal.

On motion for a mandamus to the justices to enter continuances to their next sessions, and at those sessions quash the rate,

Writ refused: for, per Lord Denman, C. J., and Littledale, J., if the rate were quashed otherwise than on certiorari, parties who had acted in collecting it would lose the protection given to such persons by stat. 12 G. 2, c. 29, s. 18, in the case of a rate being quashed.

And, per Littledale and Coleridge, J., the quashing of the rate being a judicial act (under a local statute, 3 G. 4, c. cvii.), this Court could not order them by mandamus to perform it.

And, per Coleridge, J., *seem* that a mandamus could not go, because the sessions, when called upon to quash the rate, had not power to do so.

By stat. 3 G. 4, c. cvii. (local and personal, public,) if a county rate for Middlesex be made before it appears to the justices that three fourths of the last preceding rate are expended, the order for the rate is to contain a proviso suspending the collection till the three fourths are expended. If a rate be otherwise made, appeal is given to the quarter sessions.

An order for a rate recited that the three fourths were expended, and did not contain the proviso. A party, not having appealed, applied for a certiorari to bring up the rate, on affidavits suggesting that the three fourths had not been expended. Certiorari refused. *Regina v. Middlesex Justices*, 540

2. What must be brought up for the purpose of quashing a rate, 540. Ante, 1.

3. Refused where rate good on the face of it, Ante, 1.

III. Recognisance, when not necessary.

The enactment 5 G. 2, c. 19, s. 2, that orders of justices shall not be removed by certiorari unless recognisance be given by the party removing, does not apply to writs of certiorari sued out by a prosecutor.

And therefore, where a conviction had been quashed by order of sessions and the informer obtained a certiorari to remove such order, the Court refused to quash the writ on the ground that no recognisances had been given. *Regina v. Spencer*, 485

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Amicable suit, 255. *STATUTE, XXIII.*

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- I. Distinction between trusts for the poor of the parish generally and trusts partially in aid of the parish funds, 255. *STATUTE, XXIII.*
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- I. Upper Canada, 731. *HABEAS CORPUS, I.*
- II. Colonial law, 731. *HABEAS CORPUS, I.*
- III. Judicial notice of their legal proceedings, 731, 783. *HABEAS CORPUS, I.*

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- Right of.
- I. What interest amounts only to, 444. *POOR, VI. 3.*
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Of punishment, 731 784. *HABEAS CORPUS, I.*

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COMPENSATION.

For what interests.

P. held premises under an agreement for one year, and afterwards to quit on three months' notice at any quarter-day. He was not to underlet or give up possession to another, or make any alteration, without consent of his landlord; and was to leave for his landlord's benefit all improvements or additions made during his occupation. He made certain improvements, and was afterwards ejected upon due notice to quit. Held that he was not entitled to compensation for such improvements under sect. 19 of the Hungerford Market Act, 11 G. 4, c. lxx., although the notice to quit was given by reason of the passing of that act. *In re Palmer v. Hungerford Market Company, 463*

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- 2. Of plea as to part, 861. *TROVER, I.*
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- I. To own imprisonment, 721, 783. *HABEAS CORPUS, I.*
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- I. When not implied, 693. *MASTER AND SERVANT, I. 1.*
- II. For promise, where there is a remedy by covenant, 532. *ASSUMPSIT, I.*
- III. As between bankers and customer, 375. *BANKRUPT, I. 1.*

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CONSPIRACY.

Indictment.

1. Must show that the purpose was necessarily criminal.

A count for conspiring to deceive and defraud divers of her Majesty's subjects, who should bargain with defendants for the sale of goods, of great quantities of such goods, without making payment, remuneration, or satisfaction for the same, with intent to obtain profit and emolument to defendants (not stating the means) is bad, as not showing that the conspiracy was for a purpose necessarily criminal.

But it is no objection that the count does not name the parties who were to have been defrauded.

A count charging that defendants, being indebted to divers persons, conspired to defraud them of the payment of such debts, and in pursuance of such conspiracy executed a false and fraudulent deed of bargain and sale and assignment of certain goods from two of themselves to a third, with intent thereby to obtain emolument to themselves, is bad for omitting to show in what respect the deed was false and fraudulent. *Regina v. Peck*, 686

2. Must show in what respect a deed was fraudulent, 686. *Ante*, I.
- Must not show the names of the parties to be defrauded, 686. *Ante*, I.

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2. Liberal, 556. *CURATE*, III.
3. Enlarged, 836. *POOR*, XII.
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5. Of compensation clauses, 463. *COMPENSATION*.
6. Of penal statutes, 556. *CURATE*, III.
7. Nomen collectivum, 836. *POOR*, XII.
8. General words controlled by special, 911. *POOR*, I. 2.
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1. When not influenced by collateral circumstances, 644. *LANDLORD AND TENANT*, I. 5.
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3. "Any person," 871. *STATUTE*, XXXIV. 2.
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5. "Attest," 936. *POWER*, I.
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7. Lands "belonging" to the parish, 255. *STATUTE*, XXIII.
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- I. What is, 861. *TROVER*, I.
- II. What plea denies or confesses, 861. *TROVER*, I.
- III. Of check into money, 536. *STAKEHOLDER*, I.

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- Colonial, 731. *HABEAS CORPUS*, I.

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1. To demise with license, 339. **Post, II.**
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II. Leases.

License to demise.

A mandamus will not go to compel the lord of a manor to grant a license to a copyholder to demise his copyhold land on an alleged custom that the tenant may demise for three years without license. and that, for license to demise during a longer term, the lord shall have a sum certain for every year of such term. *Regina v. Hale*, 339

III. Mandamus.

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I. Sole.

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1. Rateability. **POOR, VI**
2. Freeman's interest in common, 444. **POOR, VI. 3.**

III. By-law.

Imposing penalties.

A company was incorporated, with power to the master, two wardens, and assistants (all chosen from the body of the company), to make by-laws for the government of the company, and to provide penalties, by fine, for breach of such by-laws; the company to have the fines for their use. A by-law was made, that every one of the livery of the company who should be chosen steward and refuse to take the office, should forfeit 15*l.* to the master and wardens "for the time being, or to one of them, for the use, relief, and maintenance" of the company.

Defendant was chosen steward, and refused to take office. At the time of his election and refusal, G. was master, and C. and L. were wardens.

G., C., and L. brought debt against defendant upon the by-law, not naming themselves, in the commencement of the declaration, as present or late officers, nor stating that they sued for the use of the company, but alleging the above facts, and that defendant had forfeited and become liable to pay 15*l.* to the master and wardens for the time being, or one of them, to the use, &c., of the company, whereby an action had accrued to plaintiffs, G. so being master, and C. and L. so being wardens, to demand, &c. (not adding to the use, &c., of the company). Breach, that defendant had not rendered to the plaintiffs or the company.

Plea, that, at the commencement of the suit, G. was not master, nor C. warden. On demurrer,

Held, that the action did not lie, the right to sue not remaining in the officers after they had quitted office.

Quare, whether the action was maintainable by any one? *Graves v. Colby*, 356

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II. Liability of particular persons.

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III. Of discontinuance.

Where a defendant pleads *puis darrein continuance*, the plaintiff may always discontinue without payment of costs.

Therefore, where defendant (after plea) pleaded his bankruptcy and certificate *puis darrein continuance*, and plaintiff thereupon took out a summons for leave to discontinue without costs, it was held that he was entitled so to do, and that defendant could not be allowed to sign judgment of *non pros* for want of a replication. **Stat. 6 G. 4, c. 16, s. 59**, is not applicable where a certificate in bankruptcy is pleaded *puis darrein continuance*. *Wallen v. Smith*, 505

IV. Where less than 20*l.* recovered.

Power of arbitrator or Court.

A certificate for full costs, under Reg. Gen. Hil. Vac. 4 W. 4, *Directions to taxing officers*, where a cause is tried before a judge and less than 20*l.* recovered, must be given by the judge himself; and if, from an unavoidable cause, as the judge's death, it cannot be obtained from him, the Court cannot direct it to be entered on the postea. Although the cause was referred at nisi prius to an arbitrator, who, on giving his decision, stated that it was fit to be tried by a judge. *Astley v. Joy*, 702

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III. Leases by.

Land which has been annexed to a perpetual curacy of a parish, by the Governors of Queen Anne's Bounty under 2 stat. 1 G. 1, c. 10, ss. 4, 21, cannot be leased by the curate so as to bind the successor, if the patron only consent, and not the ordinary.

Though conveyed to the curate and his successors for ever, and allotted and applied by the Governors to the church, and annexed thereto, to go in succession with the church.

Quære, per Lord Denman, C. J., and Williams, J., whether such curate is one of the persons whose leases are made valid by stat. 32 H. 8, c. 28, s. 1.

Semble, per Littledale, J., he is. Per Coleridge, J., contra. Agreed by the Court that, if he be within sect. 1, he is within the restriction of sect. 4. *Doe dem. Richardson v. Thomas*, 556

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1. In respect of generality.

In trespass for breaking and entering plaintiff's close, and erecting stalls, booths, &c., there, defendant justified under a custom that, at fairs holden at certain times of the year, on some part of the commons and waste of a manor, to be named by the lord of the manor (the locus in quo being parcel of such commons and waste, and named by the lord), every liege subject exercising the trade of a victualler might enter at the time of the fairs, and, for the more conveniently carrying on his said trade, erect a booth, &c., and continue the same for a reasonable time after the fairs, paying 2d. to the lord.

Held, that the custom was reasonable, and the plea a good justification in trespass brought by the owner of the soil.

And that the word "victualler" was to be understood in the sense which it bore at the time of the plea pleaded. *Tyson v. Smith*, 406

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DEVISE.

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1. Leaseholds for lives.

Tenant by demise to him and his heirs for lives devised as follows (after legacies of money and furniture): "I give, bequeath, and devise to my wife A. *all my money, securities for money, goods, chattels, and estate and effects of what nature or kind soever, and wheresoever the same may be at the time of my death.*" And I appoint my said wife executrix. The heir at law was not mentioned in any part of the will.

Held, that by the word "estate" the residue of the term passed to the widow.

Although it was contended that, by a covenant in the lease, such a disposal of the term would cause a forfeiture; on which point the Court gave no opinion. *Doe dem. Evans v. Evans,* 719

2. Effect of the word "estate," 719. Ante, 1.

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1. What does not vest the fee in them.

Devise to R. and W. in trust that they and their heirs shall set and let the premises, and out of the rents and profits pay a debt of the testator, and certain legacies; devise, from and after such payment, to J. B. in fee.

Held, that the estate of the trustees determined when the debt and legacies were paid.

A house was devised, habendum for twenty-one years, from March 25th, 1809, paying rent on certain days, of which March 25th was one. The estate of which it formed part had been devised by the landlord to trustees to receive the rents and apply them to certain purposes. After the landlord's death, and before the trusts were completely executed, and during the tenancy, the reversion was sold. For a year after this sale, the purchaser received the rents, but, during the

subsequent years, from Christmas, 1817, to Lady-day, 1830, they were received by the trustees. The trusts were completely executed in 1821. On March 25th, 1830, the lessee came to the house (no one being therein), gave the key to the trustees, and departed. The trustees entered; and the purchaser, who had been present at the above proceeding, and had come to take possession, attempted to enter also, but was put back by the trustees, and they remained on the premises.

Held, that if the lessee's term had expired, the reversioner's entry would have been good, notwithstanding the occupation by the trustees.

But that the term, under the above lease, did not expire till the end of March 25th, 1830.

Held, also, that the acts of the lessee on that day did not necessarily import a surrender or a forfeiture. *Ackland v. Lutley*, 879

2. Effect of power to let, 879. Ante, 1.

IV. Remoteness.

Devise of freehold to testator's daughter Sarah for life, and from and after her decease to "such of her children as she now has or may have, if a son or sons, at his or their ages of twenty-three; if a daughter or daughters, at her or their ages of twenty-one, in fee; and, in case of the death of any son or daughter of Sarah under the prescribed age, his or her share to go to the survivors and survivor of them on attaining the prescribed age, in fee; and, if Sarah should have but one child who should attain the prescribed age, all the premises to go to such only child, so attaining such age, in fee: the rents and produce of the devised premises to be applied by trustees to the maintenance of the said grandchildren till they should attain the above ages. Devise over, to a son and other daughters of the testator, and their children, if all the children of Sarah should die under the prescribed ages; and a further clause directing the rents and profits to be applied for the maintenance of the children of Sarah, or of the son's and other daughters' children, "until they become respectively interested as before mentioned." Devise over (after some intermediate clauses), if all the testator's grandchildren then born or thereafter to be born should die under the prescribed ages "without leaving any child or children then or any of them surviving." Sarah survived the testator, and died, leaving children.

Held, that, by the will, such children took a vested interest on Sarah's death, and consequently, that the devise to them was not void for remoteness. *Doe dem. Dolly v. Ward*, 582

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II. Possessory title when sufficient.

In ejectment for rooms, it appeared that H. and the lessor of the plaintiff were placed in a house by the proprietor, whose servants they had been, and occupied it in distinct portions, H. having the rooms in question to himself. L. came to reside with and attend upon H., who died some time after, having devised his interest in the rooms to the lessor of the plaintiff. The original proprietor had died before H. L. continued to occupy the rooms, but was forcibly removed from one by the lessor of the plaintiff, and the ejectment brought for recovery of the others. The declaration being served upon L., defendants (who professed to have a claim under the original proprietor) entered into the consent rule to defend as landlords, but, at the trial, gave no evidence of title in themselves.

Held that, L. having come in under H., no title in him could be set up against the lessor of the plaintiff; that the lessor of the plaintiff showed a sufficient title, none being proved by the defendants; and that they could not allege against him that he did

not prove twenty years' adverse possession in himself and H.

Held, also, that L. was not a competent witness for the defendants. *Doe dem. Willis v. Birchmore*, 662

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Plaintiffs employed B., a broker, to sell goods for them, and to deliver such goods in the port of London, according to the contracts of sale. E., a lighterman, acted in the delivery of the goods, under B.'s direction, and was employed by the plaintiffs so to do, and was paid by them. Plaintiffs, through B., contracted with a purchaser for the sale to him of a parcel of goods, to be paid for on delivery. The goods were delivered without payment; and the price was, in consequence, lost. In an action by plaintiffs against B. for the breach of duty, they called E. to prove that, while he was waiting for B.'s orders as to the delivery, a person whom E. supposed to have proper authority, but who really had not, desired E. to carry them alongside a certain vessel, which he did without orders from B., and the goods were taken away, as on behalf of the purchaser; that E. informed B. of what had happened, and, upon hearing that B. had given no orders, said it was not too late to stop the goods, and he would do so; but that B. prevented him, and did not, himself, take proper measures to stop them:

Held, that E. was incompetent by reason of his liability to the plaintiffs as their servant. *Boorman v. Brown*, 487

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A gamekeeper authorized to seize the dogs of unqualified persons sporting on a manor, by a deputation given before stat. 1 & 2 W. 4, c. 32, and not renewed, cannot justify seizing the dogs of uncertificated persons committing such trespass, since the passing of the act.

Nor is he entitled to notice of action under stat. 1 & 2 W. 4, c. 32, s. 47, on the ground that he bona fide supposed himself to be acting in pursuance of the statute. *Lidster v. Borrow*, 654

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pay such sums." Held, that the bond was a continuing security.

Held also, on general demurrer, that, in assigning a breach of the condition, it was not enough to aver that defendant "had and received notice" that certain sums were due from B., without averring a notice or request to pay. *Butson v. Spearman*, 248

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At common law, a Judge of the Court of King's Bench may grant in vacation a writ of *habeas corpus ad subjiciendum*, returnable immediate at chambers, to bring up the body of a party in custody in execution of a criminal sentence.

After the return to the *habeas corpus* has been put in and read, it is considered as filed; but the Court has nevertheless power to amend it.

The return to a *habeas corpus*, directed to the gaoler of Liverpool, set out a statute of Upper Canada (passed after stat. 5 G. 4, c. 84.) to enable the government thereof to extend a conditional pardon to persons concerned in the late insurrection, whereby it was enacted that, on the petition of any person charged with high treason there committed, preferred, before arraignment, to the Lieutenant Governor, confessing such person's guilt, and praying for pardon, the Lieutenant Governor might grant a pardon on such conditions as might appear proper, which pardon was to have the effect of an attainder for high treason, so far as regarded realty and personalty; and that, where a person, pardoned on condition of transportation or banishment from the province, should return, contrary to the condition, this should be a capital felony; the return also set out other statutes (passed after stat. 5 G. 4, c. 84.), whereby it appeared that both transportation and banishment were inflicted in certain cases by the criminal law of Upper Canada, and that they were also imposed as commutations for the punishment of death in cases of capital conviction; the place of transportation, in either case, to be declared under the sign manual of the Lieutenant Governor. The return then stated that the prisoner, having been indicted for high treason, had, before arraignment, petitioned, confessed, and prayed for pardon, and had been pardoned on condition of being transported for his life to Van Diemen's Land, to which he had assented; that, there being no means of transporting him thither directly from Upper Canada, it was necessary to take him to Quebec, in Lower Canada, being the most convenient place for the purpose; and that he was conveyed, by warrant of the Lieutenant Governor of Upper Canada, to Lower Canada; and, on his arrival there, was, by warrant of the Governor of Lower Canada, delivered into the custody of the sheriff of

Quebec, for safe keeping till he could be transported; that, there being no means of conveying the prisoner directly from Lower Canada to Van Diemen's Land, it was necessary to convey him to England, to be taken thence to Van Diemen's Land; and that, by letters patent of the Queen under the great seal of Lower Canada, the master of the bark C. was commanded to receive the prisoner from the sheriff of Quebec, and carry him to such part of Great Britain as should seem fit to the Queen, that he might be thence transported to Van Diemen's Land, and to deliver him, in England, to the custody of such person as should be authorized to receive him; that the master received him from the sheriff, and carried him to Liverpool, which place seemed fit to the Queen, and was the most convenient in that behalf; and, there not being means ready to convey him to Van Diemen's Land, it was necessary to place him in safe custody till means could be provided; and that, the gaol of Liverpool being the most fit custody, the master delivered him to the gaoler, who kept him in custody while such means were preparing. Held, a good return. For,

(1.) The provincial legislature, under stat. 31 G. 3, c. 31, had the power to pass laws for transportation *extra fines*, which power is recognised in stat. 5 G. 4, c. 84, s. 17; and they might empower the governor to pardon on such conditions "as might appear proper." Therefore

(2.) The condition of transportation might here be legally annexed to the pardon, with the prisoner's assent.

(3.) The crown had a right to enforce the condition; and the Queen's subjects, without the province of Upper Canada, were justified in assisting, the province not being a foreign country.

(4.) It was not necessary that the return should specially set out the documents referred to.

(5.) The crown might appoint Van Diemen's Land as a place of transportation, and the Court would presume that proper steps had been taken for the prisoner's reception there.

A similar return held good, where the condition was transportation for fourteen years from the prisoner's arrival in Van Diemen's Land.

The like, where the returns stated capital convictions for high treason and felony, and commutations of the sentences, not specifying the treason or felony.

Held, also, that the return must be taken to be true on the motion to discharge out of custody; and need not be verified by affidavit. *Quære*, whether there be any and what mode (other than by action) of impeaching the truth of such a return, or of introducing new matter?

It appeared on affidavit, that in the mandatory part of the letters patent addressed to the master of the bark, the prisoner's name was omitted, though it stood in the recital; and that the return, as originally drawn, had set out the letters patent, which were also incorrect in other particulars; but that the present return, stating the substance as above, had been drawn by counsel, and filed instead of the original return.

Held, that the gaoler might substitute a

return drawn by counsel for that originally prepared.

It appearing by affidavit that the omission of the name was unknown to the gaoler, an attachment against him was refused, though the Court considered him blameable for negligence.

Held, that the letters patent were immaterial; but that, had the return been intentionally false, the gaoler would not have been protected by the immateriality, nor by the circumstance that the prisoner had not been injured by the falsehood. *Leonard Watson's Case*, 731

II. Return.

1. Negligence in making, 731, 804. Ante, I.
2. What must be set out, 731, 785. Ante, I.
3. Degree of correctness required, 731, 787. Ante, I.
4. Not required to be verified by affidavit, 731, 794. Ante, I.
5. To be received as true, 731, 782, 795. Ante, I.
6. Of what the Court will take judicial notice, 731, 783. Ante, I.
7. Truth how questioned, 731, 785, 795. Ante, I.
8. Attachment for false return, 731, 794. Ante, I.
9. Amendment of return, 731, 804. Ante, I.
10. Introduction of new matter, 731. Ante, I.

HARBOURING SERVANTS.

P. 693. MASTER AND SERVANT.

HIGH TREASON.

Proceedings in the colonies, 731. HABEAS CORPUS, I.

HIGHWAY.

I. Repair by tithing.

Where a parish consists of several tithings, each of which has immemorially repaired its own highways, the parish cannot form a board under sect. 18 of 5 & 6 W. 4, c. 50. (Highway Act:) and rates made by such board, although separately for each tithing, are bad. *Regina v. Bush*, 820

II. Formation of board, 820. Ante, I.

HIRING.

Contract of, 693. MASTER AND SERVANT, I. 1.

HOLDING OVER.

By undertenant, 849. LANDLORD AND TENANT, IX.

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BARON AND FEME.

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- I. Ascertainment of, 895. VENDOR, II. 5.
- II. Of actions, 508. VENDOR, I. 1.

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Of fact, 699. ARBITRATION, III.

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- I. Of lease or agreement, 857. LANDLORD AND TENANT, I. 7.
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IMMATERIALITY.

In pleading. PLEADING, XXI.

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Exception by, 731, 783. HABEAS CORPUS, I.

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- I. Consent to, 731, 783. HABEAS CORPUS, I.
 II. When it does not constitute a separation of husband and wife, 622. POOR, VIII.

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By interest. EVIDENCE, II.

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In pleading, 303. PLEADING, XXIV.

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P. 468. JUSTICE, I.

INCUMBRANCE.

What, 468. JUSTICE, I.

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I. Accruer of cause of action.

On a contract to indemnify a plaintiff against costs, which he is afterwards called upon to pay, the cause of action arises when he pays, not when the costs are incurred, or the attorney's bill delivered to such plaintiff.

Therefore the Statute of Limitation runs from the time of payment. *Collings v. Heywood*, 633

II. Statute of Limitations, 633. ANTE, I.

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- I. For conspiracy to defraud, 686. CONSPIRACY.
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CRIMINAL INFORMATION. QUO WARRANTO.

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LIBEL. SLANDER.

INSOLVENT.

I. Who to bear the loss on insolvency of correspondent, 607. AGENT, III. 2.

II. Effect of discharge as to scheduled debts: where the insolvent afterwards becomes covert.

Discharge of the wife under the Insolvent Debtors' Act, 7 G. 4, c. 57, before marriage is a bar to an action against husband and wife in respect of one of the scheduled debts.

Semble, that where a discharged female insolvent acquires property and marries, whereby the property vests in her husband, the statute affords no remedy by which it can be made available to her former creditors. *Storr v. Lee*, 868

III. Proof of proceedings of court, 554. EVIDENCE, VIII. 1.

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Average loss.

By increase of freight, 314, 337. SHIPPING, I. 1.

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In support of validity of colonial proceedings, 731, 783. HABEAS CORPUS, I.

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I. Of witness. EVIDENCE, II.

II. What renders bridge rateable, 828. POOR, VI. 2.

INTERLINEATION.

I. Effect of.

Assumpsit on a written guarantee, set forth in the declaration. Plea, Non Assumpsit. On the trial, the instrument appeared to have been interlined, so as materially to alter its effect; but, without the interlining, it corresponded to the declaration. The jury found that the interlineation was made after the instrument was executed.

Held, that plaintiff was entitled to the verdict, whether or not he was privy to the alteration, the effect of the alteration, if any, being only to discharge or modify the original contract, and therefore constituting a defence which required to be shown by way of confession and avoidance. *Hemming v. Trencery*, 926

- II. A defence which must be pleaded, 926.
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- Immaterial, 499. PLEA, IV. 2.

JUDGE.

- I. Grant of habeas corpus ad subjiciendum by, 731. HABEAS CORPUS, I.
II. Not liable for false return by officer, 288. SHERIFF, III.
III. Sometimes sits in error on his own judgment, 426, 431. ERROR, I.
IV. Death of without granting certificate, 702. COSTS, IV.

JUDGMENT.

- I. Signing.
For want of a replication, 505. COSTS, III.
II. Second.
When it does not effect a merger, 288. SHERIFF, III.
III. When it cannot be pleaded by a third party, 288. SHERIFF, III.
IV. Prayer of, 861. TROVER, I.

JUDGMENT RECOVERED.

- When no estoppel, 508. VENDOR, I. 1.

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- Of colonial legal proceedings, 731, 783. HABEAS CORPUS, I.

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- I. Of courts of law in questions of parliamentary privilege, 1, 110, 162. PARLIAMENT.
II. Under Malicious Trespass Act, 704. TRESPASS, IV. 1.
III. On face of order, 619. POOR, XVI. 1.
IV. Plea of exclusive, 499. PLEA, IV. 2.

JURY.

- Question for, 548. MASTER AND SERVANT, II.

JUSTICE OF THE PEACE.

I. Qualification.

Where the qualification of a justice of the peace is an ecclesiastical benefice, a sequestration, issued at the suit of a creditor, under which possession has been duly taken, and the profits received, is an "encumbrance affecting the estate" within stat. 18 G. 2, c. 20, s. 1.

In a penal action against the incumbent for acting as a justice without being qualified, the writ of sequestrari facias is admissible in evidence against him, although the judgment roll contains no entry of an award of the writ.

Upon issuing such sequestration against a vicar, the bishop licensed him as a stipendiary curate; directed the sequestrator to

pay him 120*l.* a year as such; and assigned to him the vicarage house and grounds as a residence, which were together worth above 100*l.* a year.

Held, 1. That the salary and the grounds, being enjoyed by assignment of the bishop, and not simply as vicar, were no qualification within the above statute: 2. That the vicar, being bound to reside notwithstanding sequestration, occupied the house by right as vicar, and not by the bishop's assignment, which *quoad hoc* was merely void; but that such house, unless proved to be alone worth 100*l.* a year, was no qualification. *Pack v. Tarpley*, 468

II. Jurisdiction.

1. Under old bastardy laws, 682. POOR, XVI. 2.
2. In cases of malicious trespass, 704. TRESPASS, IV. 1.

III. Mandamus to.

To commit putative father of bastard, 682 POOR, XVI. 2.

IV. Rule against.

Discharged with costs, 704. TRESPASS, IV. 1.

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PLEA.

KENSINGTON.

- Cambden charity, 255. STATUTE, XXIII.

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QUEEN'S BENCH.

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- Of endorsee, 275. BILLS, III.

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- Number of writs of error on judgment in, 426. ERROR, I.

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- Defence as, 662. EJECTMENT, II.

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I. Tenancy, how created.

1. By building workhouse on charity lands under a local act, 255. STATUTE, XXIII.
2. License to demise copyholds, 339. COPYHOLD, II.
3. Not by mere notice from mortgagee to mortgagor's lessee, 342. MORTGAGE, II. 1.
4. Lease by perpetual curate, 556. CURATE, III.
5. Agreement or lease.

Tenant being in possession under a demise for three years ending Michaelmas, 1836, at a rent payable at Michaelmas, the landlord and tenant agreed in writing as follows. Memorandum of agreement made 13th December, 1834, between, &c.: P. (the landlord) agrees to let the farm, &c., to B. (the tenant) for fourteen years, determinable at the end of seven years with twelve months' notice (not stating the commencement), at the yearly

rent of 20*l*., payable half-yearly; a lease to be drawn upon the usual terms by T. And B. agrees to take it upon the said terms.

Held, a present lease, commencing on December 13th, 1834.

The paper had only an agreement stamp. On the trial of an ejectment, it was given in evidence as an agreement. The counsel producing it were afterwards obliged, during the trial, to rely upon it as a lease. No objection was then or previously taken to the stamp. On argument in banc, as to the operation of the document, the want of a proper stamp was urged. Held, that the objection came too late, and should have been taken at that period of the trial when counsel first stated that they should rely upon the instrument as a lease. *Doe dem. Phillip v. Benjamin*, 644

6. Tenancy or ancillary occupation, 824. *Poor*, XI. 5.

7. By illegal lease or agreement.

Trespass for entering plaintiff's house and expelling him. Plea, that plaintiff was an alien artificer; that defendant unlawfully agreed to grant, and plaintiff to take, a lease of the house for twenty-one years; that plaintiff took possession on the faith and terms of such agreement, and with the view and intent to carry the same into execution, and not otherwise; therefore defendant entered, &c., the door being open and no person therein of whom he could demand possession.

Held, that the plea was good, as showing either a lease void by stat. 32 Hen. 8, c. 16; or possession in pursuance of an illegal agreement for such a lease; and that in either case the plaintiff could not maintain the action. *Lapierre v. M'Intosh*, 857

II. Tenancy from year to year.

As distinguished from tenancy for one year.

Land was let for one year, and so on from year to year, until the tenancy should be determined as was after mentioned, with a subsequent proviso, that three months should be sufficient notice to be given from either party, and another subsequent proviso, that it should be lawful for either party to determine the tenancy by giving three months' notice. Held, that the tenancy was not determinable by three months' notice expiring before the end of the second year. *Doe dem. Chadborn v. Green*, 658

III. Tenancy at will.

Under illegal lease or agreement, 857. *Ante*, I. 7.

IV. Duration of tenancy.

1. Affirmation of, by distress, 849. *Post*, IX.
2. Termination by tender of possession, 849. *Post*, IX.
3. Termination by giving up the key, 879. *Devise*, III. 1.
4. Occupation for a year, 626. *Poor*, X. 1.
5. A term for years lasts during the whole of the anniversary of the day from which it was granted, 879. *Devise*, III. 1.

V. Attornment.

When not retrospective, 342. *Mortgage*, II. 1.

VI. Assignment.

1. Remedies of assignee against lessee for distress by lessor, 532. *Assumpsit*, I.
2. Proviso for forfeiture on, 719. *Devise*, I. 1.

VII. Forfeiture.

1. Acts not necessarily amounting to, 879. *Devise*, III. 1.
2. By devise, 719. *Devise*, I. 1.

VIII. Surrender.

1. Ineffectual attempt, 626. *Poor*, X. 1.
2. Tender of possession, 849. *Post*, IX.
3. Acts not necessarily importing, 879. *Devise*, III. 1.

IX. Holding over.

Liability of tenant on holding over by under-tenant.

Lessee for a term ending on 11th October underlet to C. from year to year, subject to the determination of his own interest. Upon the expiration of the term, C. refused to quit, and held over against the will of the lessee. On 16th October the lessee distrained on him for rent due before the 11th. On 14th December C. quitted: and the lessee then tendered possession to the original landlord, who refused to accept it. Held, that the lessee was liable, in an action for use and occupation, to pay rent to his landlord for the period between the 11th October and 14th December, but not for any longer period. *Ibbs v. Richardson*, 849

X. Notice to quit.

1. When it must not be to quit earlier than the end of the second year, 658. *Ante*, II.
2. Not necessary where tenancy illegal, 857. *Ante*, I. 7.
3. Waiver of, 626. *Poor*, X. 1.

XI. Rent.

1. Effect of payment under order in amicable suit, 255. *Statute*, XXIII.
2. Effect of payment to mortgagee, 342. *Mortgage*, II. 1.
3. Effect of payment by assignee to lessor, 532. *Assumpsit*, I.

XII. Landlord.

1. Defence as, 662. *Ejectment*, II.
2. Entry on expiration of term, 879. *Devise*, III. 1.
3. Entry on person holding under illegal demise, 857. *Ante*, I. 7.

XIII. Tenant.

1. Alien artificer, 857. *Ante*, I. 7.
2. Compensation to, by public company, 463. *Compensation*.
3. His relation to mortgagee, 342. *Mortgage*, II. 1. 809. *Post*, XVII. 1.
4. Liability for acts of undertenant, 849. *Ante*, IX.
5. Giving up possession to a stranger, 879. *Devise*, III. 1.

XIV. Mortgage, 342. Mortgage, II. 1. 809, Post, XVII. 1.

XV. Third persons.

1. Trespass by: plea of fraudulent removal, 457. *Plea*, VII.
2. Plea of payment to mortgagee, 809. *Post*, XVII. 1.
3. Giving up possession to, 879. *Devise*, III. 1.

XVI. Estoppel.

1. By acquiescence in payment of rent under an order obtained in an amicable suit, 255. *Statute*, XXIII.

2. By permitting mortgagor in possession to lease, 342. MORTGAGE, II. 1.
3. In ejectment, 662. EJECTMENT, II.

XVII. Pleading.

1. Payment to mortgagee.

To an avowry for rent the tenant may plead payment of it to a mortgagee, to whom the premises had been mortgaged in fee before the demise to the plaintiff, and who had demanded payment from the plaintiff, and threatened "to put the law in force" in case of refusal. Such plea is, in substance, a plea of payment, and not of *nil habuit in tenementis*, nor of eviction: and where the plea set out the facts at large, and concluded *et sic riens in arrears*, with a verification, held, that it was not specially demurrable on the ground that it amounted to a plea of *riens in arrears* and should have concluded to the country. *Johnson v. Jones*, 809

2. Payment to superior landlord, 245. PAYMENT, V. 2.
3. Plea of fraudulent removal, 457. PLEA, VII.

LEASE.

- I. Custom to demise, 339. COPYHOLD, II.
- II. By ecclesiastical person, 556. CURATE, III.
- III. See also LANDLORD AND TENANT.

LEASEHOLD.

Devise of, 719. DEVISE, I. 1.

LEGAL ESTATE.

Of charity lands, when vested in parish officers, 255. STATUTE, XXIII.

LETTER.

- I. For payment of money, 375. BANKRUPT, I. 1.
- II. Letters of pardon, 731, 784. HABEAS CORPUS, I.

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- I. To costs, 714. POOR, XIV.
- II. As servant, 487. EVIDENCE, II. 3.
- III. Of husband for debts of wife, 868. INSOLVENT, II.

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- I. In a proceeding of the House of Commons, 1, 122. PARLIAMENT.
- II. Whether sale makes any difference, 149. PARLIAMENT.
- III. What is not libellous per se, 282. POST, IV.
- IV. Pleading.

Effect of the innuendo.

A declaration for libel alleged, without any material introductory averment, that defendant had published of and concerning plaintiff the false, scandalous, and defamatory libel following, viz.: "Notice,—any person giving information where any property may be found belonging to H. G. (meaning the plaintiff), a prisoner in the King's Bench prison, but residing within the rules thereof, shall receive 5 per cent. upon the goods recovered, for their trouble, by applying at Mr. L.," &c. (meaning the defendant, and mean-

ing that the plaintiff had been and was guilty of concealing his property with a fraudulent and unlawful intention). Held, on general demurrer, that the innuendo, unsupported by any prefatory averment, was too large; and that the words, in themselves, were not actionable. *Gomperts v. Levy*, 283

V. See also SLANDER.

LIBERTY.

HABEAS CORPUS. PARLIAMENT.

LICENSE.

- I. To demise, 339. COPYHOLD, II.
- II. As stipendary curate, 468. JUSTICE, I.

LIFE.

- I. What words pass leaseholds for lives, 719. DEVISE, I. 1.
- II. Estate. ESTATE, II.

LIMITATION.

- I. Statutes of. STATUTE, VIII.
- II. Of claims, by rules of savings' bank, 729. SAVINGS' BANK, I.

LIS PENDENS.

When no plea, 268. ARREST, II.

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LONDON.

By laws of the Turners' Company, 356. CORPORATION, III.

LORD.

Of manor. COPYHOLD.

LOT.

Appointment by, 699. ARBITRATION, III.

MAGISTRATE.

JUSTICE.

MAINTENANCE.

- I. Order of, 682. POOR, XVI. 2.
- II. Of bastard, 619. POOR, XVI. 1.
- III. Costs not ordered against instigator of trespasses leading to a criminal information, 704. TRESPASS, IV. 1.

MALICE.

- I. When admitted by pleading over, 268. ARREST, II.
- II. When a ground of action, 268. ARREST, II.

MALICIOUS ARREST.
ARREST, II.

MALICIOUS TRESPASS.
TRESPASS, IV.

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- I. When granted.
 1. To replace a name on burgess list, 670. STATUTE, XXXIV. 1.
 2. Though the list sought to be corrected is no longer in operation, 670. STATUTE, XXXIV. 1.
 3. To justice to commit putative father of bastard, 682. POOR, XVI. 2.
- II. When not peremptory in the first instance, 670. STATUTE, XXXIV. 1.
- III. When refused.
 1. To lord of manor to grant license, 339. COPYHOLD, II.
 2. To justice to do a judicial act, 540. CERTIORARI, II. 1.
 3. To do an act interfering with a statutory protection, 540. CERTIORARI, II. 1.
 4. To do an act which the party has no power to do, 540. CERTIORARI, II. 1.
 5. When leading to no result, 729. SAVINGS' BANK, I.
- IV. Direction, 670. STATUTE, XXXIV. 1.

MANOR.

COPYHOLD. GAME.

MARRIAGE.

BARON AND FEME.

MASTER AND SERVANT.

- I. Contract.
 1. Must be mutual.

B. contracted in writing to work for plaintiff in his trade, and for no other person, during twelve months, and so on from twelve months to twelve months, until B. should give notice of quitting.

Held, that such agreement was invalid under stat. 29 C. 2, c. 3, s. 4, for want of mutuality.

And that this objection might be taken by the defendant in an action by plaintiff for harbouring B., who, as plaintiff alleged, had quitted him without proper notice. *Sykes v. Dixon*, 693
 2. Within Statute of Frauds, 693. Ante, 1.
 3. When stranger may object to invalidity, 693. Ante, 1.
- II. Causes of dismissal.

If a clerk, retained at a salary to manage a mercantile business, declares that he is a partner, and will transact the business as such, the employer may immediately dismiss him. Although the party has not committed any other act of misconduct, nor refused, in terms, to go on as clerk. *Amor v. Fearon*, 548
- III. I. Servant or tenant, 662. EJECTMENT, II.
 2. Occupation as servant, 824. POOR, XI. 5.
- IV. Servant when an incompetent witness, 487. EVIDENCE, II. 3.
- V. Action for harbouring, 693. Ante, I. 1.

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Of issue, 499. PLEA, IV. 2.

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Statement of fraudulent, 686. CONSPIRACY.

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Of remedies, 288. SHERIFF, III.

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County rate, 540. CERTIORARI, II. 1.

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Malicious, 704. TRESPASS, IV. 1.

MISCONDUCT.

Of servant, 548. MASTER AND SERVANT, II.

MISNOMER.

Of defendant.

I. Sheriff, how affected.

Declaration against a sheriff for taking insufficient bail, &c., alleged a capias against Frederick S. by the name of William S., and an arrest under it by defendant, and that Frederick S. was known as well by the name of William, as Frederick, whereof defendant had notice; and that, before the debt accrued, he had often admitted to plaintiff that he was known by the name of William, whereof defendant had notice at the time of arrest. Plea, that, at the time of the arrest, Frederick S. was not known, nor had defendant notice that he was known, as well by the name of William as Frederick; and that defendant arrested Frederick S. on the false information of plaintiff's agent, that he was the William S. described in the writ; and that Frederick, being so arrested, did not admit himself to be William S., &c. Verification.

Held, that the averment, in the declaration, of the frequent admissions by Frederick S. was superfluous, and mere matter of evidence; that so much of the plea as denied that Frederick S. was known as well by one name as the other, and that defendant had notice thereof, was a complete answer, and ought to have concluded to the country; and that the rest of it was immaterial and redundant, and ground of special demurrer; but that the plea was good on general demurrer.

Quare, whether the use of a wrong name, on a single occasion, by the party arrested, will support an allegation that he was known by that name? *Brunskill v. Robertson*, 840

II. Pleading, 840. Ante, I.

MISTAKE.

I. Assent under, 699. ARBITRATION, III.

II. In supposition that the party filled a particular character, 654. GAME.

MONEY.

Remittance, 607. AGENT, III. 2.

MONEY HAD AND RECEIVED.

ASSUMPSIT, II.

MONEY PAID.

ASSUMPSIT, III.

MORTGAGE.

I. By assignment of bond, 292. BOND, I. 1.

II. Mortgagee.

1. His rights against lessee of mortgagor in possession.

Where a mortgagor in possession makes a lease, after the mortgage, reserving rent, the mortgagee cannot, by merely giving the lessee notice of the mortgage, and that principal and interest are in arrear, and requiring such lessee to pay the rent to him, make the lessee his tenant, or entitle himself to distrain for rent subsequently accruing under the terms of the lease.

Nor, if, after such mortgagee's death, his executors distrain for rent accorded before his death, but after the notice, and avow upon a holding by the lessee under the terms of the original lease, as tenant to the mortgagee, will such avowry be supported by proof that, after the mortgagee's death, the lessee paid the executors rent, in sums and at periods corresponding to the reservation in the lease, and recognised them as his landlords by letter: such a recognition not having relation back to the notice.

Quare, how far the mortgagee by his own conduct, as by permitting the mortgagor to remain in possession and to lease, without interfering, may preclude himself from treating the mortgagor and his lessee as trespassers? *Evans v. Elliott*, 342

2. Payment of rent to, 809. LANDLORD AND TENANT, XVII. 1.

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II. Burgess-roll.

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- III. Officer. OFFICER, III.

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 - 1. Power of the House of Commons to order publication of its proceedings.
It is no defence in law to an action for publishing a libel, that the defamatory matter is part of a document which was by order of the House of Commons laid before the House, and thereupon became part of the proceedings of the House, and which was afterwards, by orders of the House, printed and published by defendant; and that the House of Commons heretofore resolved, declared, and adjudged, "that the power of publishing such of its reports, votes, and proceedings as it shall deem necessary or conducive to the public interests is an essential incident to the constitutional functions of Parliament, more especially to the Commons House of Parliament as the representative portion of it.
On demurrer to a plea suggesting such a defence, a court of law is competent to determine whether or not the House of Commons has such privilege as will support the plea. *Stockdale v. Hansard*, 1
 - 2. How far each house may judge of its own privileges, 1, 108, 161, 190, 216. Ante, 1.
 - 3. How far inquirable in other courts, 1. Ante, 1.

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- 3. Power to commit for contempt, 1, 126, 169, 196. Ante, I. 1.
- 4. Printing and sale of proceedings, 1, 150, 170, 204, 237. Ante, I. 1.

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 2. On distress by superior landlord, 532. ASSUMPSIT, I.
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 4. Of rates, 626. POOR, X. 1.
- IV. Effect of.
 1. Of rent, 255. STATUTE, XXIII. 342, MORTGAGE, II. 1.
 2. Earnest or part payment, 508. VENDOR, I. 1.
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 4. When it constitutes the damage, 633. INDEMNITY, I.
- V. Pleading.
 1. Informal plea of, 275. BILLS, III.
 2. Plea of, to what it is to be considered as pleaded.
Declaration in debt for two years' rent, at 90*l.* per annum, due 1st November, 1836; the particulars of demand giving credit for the first of the two years' rent, less 16*l.* 16*s.* 6*d.* Plea, as to 135*l.*, parcel of the said rent, that plaintiff held as tenant to C.; that, before and at the time when the said 135*l.* became due, 135*l.* was in arrear from plaintiff to C., who claimed it of defendant, and defendant paid it to C. to avoid a distress. Replication, admitting the payment to C., but averring that the sums paid by defendant were deducted from money due at the time of payment from defendant to plaintiff; and that, at the commencement of the action, 135*l.* was due from defendant to plaintiff, beyond the sum so paid.

Rejoinder, that the sums were not so deducted, and traversing that 135*l.* was due beyond the sums paid.

Held (before the operation of rule of Trin. 1 Vict., as to not pleading payments allowed in particulars of demand) that, assuming the declaration to be only for the balance of 106*l.* 16*s.* 6*d.* (but *semble* contra), and the defendant as pleading to that only (though the Court considered that the plea was really pleaded to more), yet the replication denied that the payments were applied to that balance, and the rejoinder took issue thereon; and therefore plaintiff might prove that the payments applied to debts independent of the balance, and left the balance still due. *Ferguson v. Mahon*, 245

3. Plea of, to all the sums mentioned in a declaration which admits a part payment, how applied.

Assumpsit, stating that defendant owed plaintiff 883*l.* for goods sold and delivered; but that, although he has paid 664*l.*, the residue is unpaid. The particular of demand claimed a balance of 219*l.*

Plea, payment to the amount of all the moneys mentioned in the declaration. Replication, new assigning, as to so much of the plea as relates to 175*l.*, parcel of the moneys in the declaration mentioned, that the action is brought, not for a part of the causes of action mentioned in the plea, to the amount of 175*l.*, in respect of which defendants paid plaintiffs a part of the sums in that plea mentioned, viz. 175*l.*, but for breach of a promise to pay plaintiffs another and a different sum, viz. 175*l.*, part of the moneys in the first count mentioned, and in which defendant was indebted to plaintiff as there mentioned, for goods sold and delivered between June 1st, 1836, and December 20th, 1837; which promise was made as in the declaration mentioned, and is different from the promise to pay the 175*l.* so paid to plaintiffs, and the causes of action in respect thereof. And, as to the residue of the causes of action in the declaration mentioned, that defendant did not pay the residue of the sums, &c.

Rejoinder. 1. Payment of all the moneys claimed by the new assignment. Traverse, and issue thereon. 2. That the promise mentioned in the declaration, as to 175*l.*, is not a different cause of action from the promise to pay 175*l.* so paid to plaintiffs, and the causes of action in respect thereof. Issue thereon.

On the trial, plaintiffs proved, among other demands (not available in this action), goods supplied to the amount of 370*l.*, and payments to the amount of 312*l.*, leaving a balance not in point of fact covered by the payment of 175*l.* admitted in the replication. Verdict for plaintiff, 58*l.*

Motion for a nonsuit, on the ground that the declaration claimed only a balance of 219*l.*; that the first plea related to that only; that the replication admitted a payment of 175*l.*; that the plaintiff's claim, therefore, on the record, was only for the difference between that sum and 219*l.*; and that defendants had proved payment of 312*l.*

Held, that plaintiff was entitled to recover. For,

- (1.) That the plea of payment was not confined to the balance.
- (2.) That the admission, in the new assigna-

ment, of 175*l*. having been paid, was not an admission of payment in respect of the balance of 219*l*. ; but was, by the language of the new assignment, a virtual allegation that the 175*l*. was part of the 664*l*. admitted in the declaration to have been paid. *Alston v. Mills*, 248

4. Of payments allowed in particulars of demand, 245, 248. *Ante*, 2, 3.

5. Conclusion to plea of, 809. LANDLORD AND TENANT, XVII. 1.

6. Replication and issue on the balance to which the payments were applied, 245. *Ante*, 2.

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IV. General properties.

1. Need not meet an objection that must be replied or new assigned, 861. TROVER, I.

2. Bad as tendering an immaterial issue.

Where defendant in an action of debt pleads, 1. As to all but a parcel of the sum claimed, that he never was indebted: 2. As to such parcel, that defendant was indebted in no more, and that the same was recoverable in a court of requests having exclusive jurisdiction. *Scilicet*, that such second plea may commence as an answer to part only of the declaration, and need not be pleaded to the whole.

Where such court of requests has exclusive jurisdiction of debts up to a certain amount, the plea must state in terms that defendant was not indebted beyond that amount. It is not sufficient to allege that he was not indebted in beyond a smaller sum, which is specified:

For a plea must be shaped so that the averments, if traversed, will be material and conclusive whether found for plaintiff or defendant; and this averment would not be so, if found for the plaintiff. *Burroughs v. Hodgson*, 499

V. To what pleaded, 245, 248. PAYMENT, V. 2, 3.

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1. Defence not available under, 926. INTERLINEATION, I.

2. What does not amount to the, 861. TROVER, I.

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How to be restricted.

In an action of trespass for breaking and entering the plaintiff's house and taking his goods, a special plea, justifying an entry to seize goods fraudulently removed by the defendant's tenant, should be confined to the breaking and entry; and the property in the goods should be traversed in a separate plea.

Quære, whether, in trespass *de bonis*, &c., a special plea, showing property in another, gives sufficient implied colour to the plaintiff, if it distinctly admits his possession. *Fletcher v. Marillier*, 457

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8. Judgment recovered, when no estoppel, 508. VENDOR, I. 1.

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- ant was as well known by one name as another, 840. MISNOMER, I.
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- XXIII. What must be traversed.
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- XXIV. Special traverse.
 1. The inducement must not contain a complete confession and avoidance.

Trover by assignee of bankrupt for goods of the plaintiff as assignee, laying a conversion by three defendants, G., R., and P.

Plea by defendants R. and P., that after the bankruptcy, and two calendar months before the fiat, the plaintiff, as assignee, to wit, by the relation of his title to the act of bankruptcy, though not then appointed assignee, was owner, and entitled to the possession, of the goods, and the bankrupt was possessed of them subject to such title of the plaintiff; that two calendar months before the fiat, the defendant R. bona fide bought of the bankrupt, who then bona fide sold and delivered to R., the said goods at a reasonable price, and that, at the time of the sale, neither of the defendants had notice of any prior act of bankruptcy; whereby R. became possessed of the goods as of his own property, and that he, being so possessed, and P., as his servant, converted them; which is the same grievance, &c., without this, that at the time of the said conversion, the goods were the property of the plaintiff as assignee. Conclusion to the country.

Held, on special demurrer to the plea, that the introductory part of it confessed and avoided the declaration, and the traverse was therefore idle.

Quære, whether the plaintiff might have treated the traverse as immaterial, and pleaded over? *Pearson v. Rogers*, 303
2. Pleading over to inducement, 303. Ante, 1.
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 1. See PLEA, XI.
 2. Application of payments, 245, 248. PAYMENT, V. 2, 3.
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Where the poor law commissioners, by order under stat. 4 & 5 W. 4, c. 76, s. 26, form several parishes into a union, but the parishes are not united for the purpose of rating, and one of the parishes, before the issuing of such order, has been governed by a local act, which directed that the vestrymen of such parish should assess and lay the poor rates, and appoint a collector,

Held, that the poor law commissioners cannot, by order made under stat. 4 & 5 W. 4, c. 76, s. 46, direct the guardians to appoint a collector of poor rates for such parish. *Regina v. Poor Law Commissioners*, 901

2. Where the poor law commissioners, by order under stat. 4 & 5 W. 4, s. 26, form several parishes into a union, but not for the purpose of rating, they cannot, by order under sect. 46, appoint a collector of poor rates for any parish or parishes of such union. *Regina v. Poor Law Commissioners*, 911

3. Certiorari to bring their orders up, 901, 911. *Ante*, 1, 2.

II. Unions.

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2. Collector of rates, 901, 911. *Ante*, I, 1, 2.
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1. Union for purposes of, 901, 911. *Ante*, I, 1, 2.
2. Time of making, &c., 626. **Post, XI, 1.**

VII. Persons and property rateable.

1. Property held for public purposes.

Where a municipal corporation had been rateable and rated to the relief of the poor, in respect of town and anchorage dues, be-

fore stat. 5 & 6 W. 4, c. 76 (for the Regulation of Municipal Corporations):

Held, that sect. 92 of that act, by appropriating all the corporate funds to purposes of a public nature, exempted the above dues from further rateability. *Regina v. Liverpool, Mayor, &c.*, 435

2. Where persons have a private interest.

A company, incorporated by stat. (57 G. 3, c. lviii.), for rebuilding a public bridge, was enabled to raise a capital stock by shares, with the usual powers of mortgaging tolls, &c. The dividends were limited to 7½ per cent. on the shares; and the excess was to be applied to paying off the subscribed capital, and to raising a fund for discharging mortgage debts, &c., and repairing the bridge; after which the tolls were to cease. The tolls were in fact absorbed by the payment of interest to mortgagees, the liquidation of debts, and the expense of repairs, leaving nothing for the payment of any interest or dividend to the shareholders. Held, that the company was rateable to the relief of the poor in respect of the bridge and the land occupied by it. *Regina v. Blackfriars' Bridge Company*, 828

3. Interest that of commoners only.

By immemorial user, and grants of various dates by the lords of the soil to the corporation of A., the freemen of A. and their widows were entitled to have common of pasture and turbary in A. moor, paying a fixed rent, and to cut peat, furzes, and brushwood, with liberty to get limestone, slate, and freestone, to dig clay, burn bricks, take flags, whins, and wattles, to dig and take sand, gravel, and marl for the use of the freemen in certain parts of the moor, and to erect limekilns and herds' houses where the lord's bailiff and the corporation should think fit. The corporation made by-laws to regulate the stints, appointed moor grieves to enforce them by distress, &c., and persons to hoe and burn whins, gather stones, and drain and sow grass. The lord of the soil had a right to grant licenses to make bricks, get clay, make washpools, and win ironstone, coals, and limestone, but not to grant the herbage of the moor; nor did he depasture cattle there: Held, that the interest of the freemen was substantially that of commoners only, and that the corporation was not rateable to the poor in respect thereof. *Regina v. Alnwick, Chamberlains, &c.*, 444

4. Saleable underwood.

A wood, consisting of oak growing from old stools, with a few ash, alder, and beech trees, had not been felled for fifty years until three years before it was rated. During the last three years the owner had annually cut the worst shoots, selling the poles by the dozen for colliery purposes and firewood, and the bark by the ton. The wood was also occasionally wasteweeded to improve the plantation. The sessions found that the wood was not saleable underwood within stat. 43 Eliz. c. 2, and the Court of Q. B. confirmed the order.

Whether woods be saleable underwoods within the statute, is a question of fact, and the Court of Q. B. will confirm the finding of the sessions upon it, unless it be evidently wrong. *Regina v. Narberth North*, 815

5. How far dependent on mode of management, 815. Ante, 4.
6. Rateable occupation, 444. Ante, 3.

VIII. Appeal against rate.

Finding of sessions when conclusive, 815. Ante, VI. 4.

IX. Removability of poor.

Separation of husband and wife.

Where a debtor is imprisoned in the county gaol in execution under a Court of Requests act (which authorizes such imprisonment for a limited time), and his wife resides in the parish where the gaol is situate, and has occasional access to him under the prison regulations, she cannot, if chargeable, be removed from the parish; for the principle, that husband and wife shall not be separated by an order of removal, applies, notwithstanding such imprisonment of the husband. *Regina v. Stogumber*, 622

X. Settlement by apprenticeship.

Residence in different parish.

A pauper, apprenticed to a carpenter in parish S., being disabled by an accident from working in his business, was taken by his master to his (the apprentice's) father's house in parish M., for the benefit of surgical attendance. He resided there forty days, and during such residence was employed by his master to sell tickets in a lottery, in which the prizes were articles manufactured by the master, and was allowed by him 1s. on each ticket sold, in aid of his maintenance: Held, that he gained a settlement in M., although the sale of such tickets was illegal. *Regina v. Somerby*, 310

XI. Settlement by payment of rates.

1. Since 4 & 5 W. 4.

Since the passing of stat. 4 & 5 W. 4, c. 76, s. 66, a person cannot gain a settlement by renting and occupying a tenement, unless he has been assessed to and paid the poor rate in respect thereof for a year. But he may gain a settlement by payment of rates under stat. 3 & 4 W. & M. c. 11, s. 6, if he has been assessed to and paid poor rate for part of the year only, provided his renting and occupation have been such as to satisfy stat. 6 G. 4, c. 57, s. 2.

Pauper took a house at a yearly rent, payable quarterly, the tenancy to be determinable at any time, on a quarter's notice. At the end of the first quarter he paid the rent, but said it was too high, and that he should quit. The landlady said that, if he would remain, she would take off 10s. per quarter, which was agreed to, and the agreement acted upon. Pauper remained to the end of the year. Held, an occupation for a year under the original yearly hiring.

Ten days before the end of the year, pauper quitted the premises with his family, locked up the house, leaving only some few of his things in it, and went into another house. He likewise offered the key to his landlady, but she refused to accept it till the end of the year, when he gave it up to her and paid the full rent. Held, a sufficient occupation by the pauper for a year, under stat. 6 G. 4, c. 57, s. 2.

Where payment of rates for a whole year is material, it is no excuse for non-payment of the last rate, that such rate, though made

during the year, was not published till after its expiration. *Regina v. St. Mary Kalendard*, 625

2. What occupation sufficient, 626. Ante, 1.
3. What rates, 626. Ante, 1.

XII. Settlement by renting a tenement.

1. Since 4 & 5 W. 4, c. 76, 626. Ante, X. 1.
2. What occupation sufficient, 626. Ante, X. 1.
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4. Underletting, 670. STATUTE, XXXIV. 1.
5. Occupation ancillary to service, or incidental.

Pauper, whose children were engaged to work for three years at a mill, removed with his family to a cottage rented by the mill owner, C., for the convenience of families so employed. The bargain between him and C. was, that a stated weekly payment for the use of the cottage should be deducted from the children's wages. Pauper, who was not himself in the service of C., continued to occupy the cottage for sixteen years, during all which time, and after he quitted it, some one or more of his children continued to work at the mill. He quitted without regular notice, in consequence of the sale of the cottage.

Held, that pauper's occupation was as tenant, and not as servant, and was sufficient to gain a settlement. *Regina v. Bishopton*, 824

XIII. Copy of the examination.

Under sect. 79 of stat. 4 & 5 W. 4, c. 76, copies of all the examinations touching the settlement of a pauper, taken by the justices upon making an order of removal, must be sent with the copy of the order; and the omission of any one examination is ground of appeal, although it may not contain the evidence upon which the order was in fact founded. *Regina v. Outwell*, 836

XIV. Grounds of appeal.

All the examinations not sent, 836. Ante, XII.

XV. Hearing of appeal. Evidence.

Incompetency of overseers.

An overseer is not competent, by stat. 54 G. 3, c. 170, s. 9, or otherwise, to give evidence for his parish on the trial of an appeal against an order of removal; whether the evidence be tendered on the merits, or on a preliminary point, as service of notice. *Regina v. Bath, Recorder*, 714

XVI. Finding of sessions.

When not conclusive, 444, 453. Ante, VI. 3.

XVII. Order of filiation.

1. What necessary to show jurisdiction.

An order for maintenance of a bastard under stat. 4 & 5 W. 4, c. 76, s. 72, is bad, if it allege that the sessions heard evidence in corroboration of the mother's statement, without adding that the corroboration was in some material particular. *Regina v. Rend*, 619

2. Mandamus to commit putative father under old law.

When an order has been made on a putative father for the payment of a sum named so long as the bastard is chargeable, a magistrate, under stat. 49 G. 3, c. 68, s. 3, is

bound to enforce the order by commitment, on proof that the sum is in arrear and the child chargeable; and he has no jurisdiction to inquire whether the sum is too large, or whether it is likely to be all applied to the maintenance of the child. *Regina v. Codd*, 682

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I. Exercise.

What the attestation must show.

Lands were limited to such uses, &c., as I. should appoint by her last will and testament in writing, to be by her *signed, sealed, and published, in the presence of, and attested by, three or more credible witnesses*. I. signed and sealed an instrument (before stat. 7 W. 4 and 1 Vict. c. 26) containing an appointment, commencing thus:—"I, I., do publish and declare this to be my last will and testament;" and ending thus:—"I declare this only to be my last will and testament. In witness whereof I have to this my last will and testament set my hand and seal, the 12th day, &c." The attestation was as follows:—"Witness C. B., E. B., A. B."

Held, by the Court of Exchequer Chamber, reversing the judgment of the Court of Q. B., not a good execution of the power.

Per Vaughan, J., Parke, B., Alderson, B., and Coltman, J. *Dissentientibus* Tindal, C. J., Bosanquet, J., and Gurney, B. *Doe dem. Spilsbury v. Burdett*, 936

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As where, by a rule of the bank, no deposit can be claimed after the expiration of seven years from the death of the depositor, and a claim, which it is proposed to refer, was confessedly not made within that time. *Regina v. Northwich Savings Bank, Trustees, &c.*, 729

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When not responsible for false return by bailiff.

No action lies against the sheriff for a false return of nulla bona by his bailiff to a writ of *fi. fa.* issued out of his county court, al-

though it be alleged in the declaration that defendant had notice of the goods, and that the return was made with his privity and by his direction.

To an action for a false return to a writ of *fi. fa.* on a judgment in the Court of K. B., it is no plea that the plaintiff, after the return of the writ, brought an action of debt on the judgment, and obtained a second judgment thereon. *Pitcher v. King*, 288

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(1.) Where goods are shipped under a bill of lading in a general ship, which is prevented from completing the voyage in consequence of damage occasioned by tempest, *quærr.*, whether the master is bound, if he has an opportunity, to forward the goods by some other conveyance to the place of destination.

(2.) At any rate, he is at liberty to do so, by a conveyance equally cheap, if he think fit; and, if the goods arrive at the place of destination by such other conveyance, he is entitled, on the freighter obtaining the goods, to the whole freight originally contracted for; though the freighter was named as consignee in the original bill of lading, and the bill of lading under which the goods are shipped by the second conveyance makes another party consignee; and though, by the second conveyance, the goods are carried for less than the freight originally contracted for.

(3.) Defendant was interested solely in certain goods conveyed by the ship S., and was also interested jointly with his partners, who with him formed the firm of T. and W., in other goods also sent by the ship S. He signed a promise to make certain payments in respect of freight on board the S., not stating upon which goods, beginning, "I hereby engage to pay," but signed with the style of T. and W. In an action against him solely, for the freight of his own goods: Held, that such engagement was evidence of a several contract by him, and, for the purpose of the action, required only one stamp.

(4.) A witness called by plaintiff stated, on the voir dire, that he had, as agent for plaintiff, instructed an attorney, E., to commence the suit: that E. had carried on the suit to a certain stage, and had died; that witness had not told E. that he was to look to plaintiff only for costs; that no demand of costs had been made upon himself; and that he had not been released. It did not appear under what circumstances the papers had been handed over to the present attorney, nor whether the costs of E. had been discharged. Held, that these facts did not show an interest sufficient to disqualify the witness. *Skipton v. Thornton*, 814

2. General ship, 314. Ante, I.

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- I. What not slanderous per se, 286, n. Post, II.
- II. Pleading.

Effect of the innuendo.

Declaration for slander stated that, at the time of the speaking, &c., plaintiff worked for and was employed by one B. Glass in his barn, in and about thrashing Glass's corn, and that defendant, intending to cause it to be believed that plaintiff had been guilty of felony, falsely and maliciously spoke of and concerning plaintiff the words, "I saw J. G. coming across Mr. Glass's barn with some barley, and my son said, 'What art going to do with that?' J. G. said he was going to feed pheasants with it, and said, where he had that he could have more, and that he had it at farmer Glass's barn," (meaning the said barn belonging to the said B. Glass, wherein the plaintiff was so at work and employed as aforesaid, and that the barley so alleged by defendant to have been in the possession of J. G. was the property of the said B. Glass, and that plaintiff had stolen the same from the said B. Glass, and given the same to the said J. G.). Averment of special damage.

Held bad, the innuendo not being borne out by the other parts of the count. And that a demurrer to such count did not imply any admission by which the defect could be aided. *Wheeler v. Haynes*, 286 n.

III. See also LIBEL.

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ATTORNEY.

SPORTING.

GAME.

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I. Action against, when premature.

Plaintiffs agreed with G. to pay him 25*l*. if he performed certain work to the satisfaction of a referee, and that a check for the 25*l*. should be deposited with defendant, to be handed to G. if the work succeeded; if not, to be returned to the plaintiffs. The check was so deposited; and defendant presented and obtained cash for it. Afterwards the referee disapproved of the work; but no decision by him was communicated to defendant.

Held, that the action was brought prematurely in respect of the alleged failure of the experiment: and that the turning of the check into money by defendant was not a breach of his duty, as stakeholder, which

entitled the plaintiffs to recover back the 25*l*. from him as money received to their use; it not appearing by the evidence that the parties had contemplated any distinction between a check and money. *Wilkinson v. Godefroy*, 536

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- XXIII. 59 G. 3, c. 12. (Poor.)**
- Sec. 17. What legal estate vested in parish officers.
- Stat. 59 G. 3, c. 12, s. 17, does not vest the legal estate of charity lands in the parish officers, where there are known feoffees in existence, and where the trust funds are applicable only to certain specified objects partially in aid of the parish funds. Therefore, where lands were vested in trustees under a charitable bequest, on trust to apply half the rents towards the relief of poor people of good life and conversation in the parish, and half for apprenticing poor boys of the parish: Held, that the legal estate was not transferred to the parish officers under stat. 59 G. 3, c. 12, s. 17, although, by a local act, a portion of the rents was applied to the expense of erecting the parish workhouse, and paying off moneys borrowed for that purpose.
- A dispute having arisen between trustees for the poor under a local act, and the trustees of certain charity lands, respecting the liability of the former to pay rent to the latter for a workhouse built on the charity land, an amicable suit was instituted in the Rolls Court, and an order obtained for payment of a certain rent in respect of the said land. The trustees for the poor acquiesced in the order, and paid rent accordingly for twelve years: Held, that they could not afterwards dispute their liability in an action for use and occupation. *Allason v. Stark*, 255
- XXIV. 5 G. 4, c. 84. (Transportation.)**
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1. Sec. 9. Occupation.
- A householder is entitled to be on the burgess list of a borough, under stat. 5 & 6 W. 4, c. 76, s. 9, as an occupier, if he resides in his house, but has let a room in the house to a tenant, who does not sleep there, and can be put out upon a week's warning.
- And, where the mayor and assessors had expunged the name of such a party from the burgess roll, and the party in the term next following obtained a rule for a mandamus to the mayor to insert his name, the Court made the rule absolute, directing the mandamus to the mayor generally, though the mayor who expunged the name had ceased to be mayor before the rule nisi was obtained, and no application had been made to the present mayor, and though the year to which the list belonged had expired before making the rule absolute.
- The mandamus to replace a name on the list, grantable under stat. 7 W. 4 & 1 Vict. c. 78, s. 24, is not peremptory in the first instance.
- The tenant and occupier of a house under-let the cellar, which was beneath, and had an internal communication with the house. The under-tenant used the cellar as a warehouse, and was separately rated to the poor for it. Held, that the tenant could not qualify as a burgess under stat. 5 & 6 W. 4, c. 76, s. 9, for the house independently of the cellar.

Two tenements, described as houses, were under the same roof, and opened upon a common passage and staircase. There was no outer door opening to the street. Held, that the rated occupier of one such tenement was qualified to be a Burgess under stat. 5 & 6 W. 4, c. 76, s. 9. *Regina v. Ege, Mayor, &c.* 670

2. Sec. 92. Appeal against borough rate.

Under stat. 5 & 6 W. 4, c. 76, s. 92, the appeal to quarter sessions against a borough rate is given only in the case of unequal apportionments of the rate among the parishes subjected to it, or the total omission of parishes which ought to be so subjected. No appeal is given to persons aggrieved as individuals. *Regina v. Bath, Recorder,* 871

3. Sec. 92. Rateability of corporate property, 435. POOR, VI. L.

XXXV. 7 W. 4 & 1 Vict. (Municipal corporations.)

1. Sec. 20. Stay of proceedings.

Quo warranto information for exercising a borough office. The ground of prosecution was, that the officers presiding at the election were not qualified. Defendant pleaded that he was duly elected. Pending the information, stat. 7 W. 4 & 1 Vict. c. 78, passed. Prosecutor thereupon moved for a stay of proceedings, and payment of costs (down to the passing of the act) by defendant, under sect. 20.

Rule absolute, although defendant suggested that he had a defence independent of the statute (not, however, specifying its nature), and offered to pay all costs of the trial if he failed in establishing such defence. *Regina v. Hooker,* 680

2. Sec. 24. Mandamus, 670. Ante, XXXIV. L.

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A party may be convicted, under the general clause, sect. 24, in stat. 7 & 8 G. 4, c. 30, of having wilfully and maliciously damaged growing wood, to the value of 6d., though sect. 20 expressly imposes a penalty for unlawfully and maliciously damaging such wood, "the injury done being to the amount of 1s. at the least."

The proviso of sect. 24, exempting from the penalty there imposed any person acting under a reasonable supposition of right, does not oblige justices to dismiss a charge made under that section, upon the mere statement of the accused party that he so acted; but, in default of proof by him, they may judge, from all the circumstances, whether or not the party did so act.

It is no proof of a bona fide claim subsisting, that several parties, other than the individual charged, have committed similar trespasses, using the same colour of right as that which he professes to rely upon, and that the complainants have obtained injunctions from the Court of Chancery against such parties.

So held on motion for a criminal information against magistrates who had convicted as above.

In discharging a rule for such information, the Court refused to order payment of costs by J. S., who appeared to have instigated the trespasses in question, and had employed an attorney to defend the persons charged with such trespasses (including the party making the present application); J. S. not having sworn an affidavit or otherwise taken a direct part in obtaining the rule.

Nor would they make such order upon the attorney, who had neither made an affidavit nor otherwise acted in obtaining the rule; although affidavits in support of the rule were sworn by his clerks; and although, on the hearing of an information for one of the above-mentioned trespasses (but not that immediately in question), he had publicly uttered words, not warranted by his professional duty, encouraging persons present to commit similar trespasses. *Regina v. Dodson*, 784

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Trover for several deer. Plea, as to the conversion of one deer, that it was wrongfully on defendant's close doing damage; wherefore defendant seized it as a distress; which seizing is the same conversion, &c. Held, on special demurrer, that the plea was good without the formal commencement of actionem non, or prayer of judgment:

Held also (Littledale, J., dubitante), that it sufficiently confessed a conversion in fact, and was not bad as amounting to the plea of not guilty, or as an argumentative denial of plaintiff's possession; and that it was unnecessary to allege how defendant disposed of the distress.

Seem, that if the conversion, relied on by the plaintiff, was not the seizure, but a subsequent abuse of the distress, he must show it in reply to the plea. *Weeding v. Aldrich*, 861

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 - 1. Forfeiture of deposit.

Where A. agrees to demise a house to B. for a term, in consideration of 800*l*. then paid "by way of deposit, and in part of 5500*l*," the whole purchase-money, possession to be delivered and accepted on a day named, and B. agrees to accept such demise, but, on the day, refuses to accept, and A. afterwards disposes of the house to a third party, *Quære*, whether, in the absence of any provision that the deposit shall be forfeited, or of any clause in the agreement, except as above, showing the intention of the parties in this respect, B. can recover the deposit from A.?

The intention may be collected from other parts of the agreement.

Thus, where there was a distinct clause providing that either party making default should forfeit 1000*l*., it was held that the deposit was not to be forfeited, and might be recovered back on A.'s disposing of the house as above.

But that it could not be recovered back before A. disposed of the house.

Under the above circumstances, an action brought for the deposit after the day named in the agreement, but before A. had disposed of the house, having failed, was held no estoppel to an action brought after A. had disposed of the house. And it was held that the facts negatived a plea that the causes of the two actions were identical. *Palmer v. Temple*. 508

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On a contract for the sale of goods lying in a warehouse, the handing of a delivery order to the vendee, and transfer of the goods to him in the warehouseman's book, will not vest the property in him, if something remains to be done for the purpose of ascertaining the identity or quantity of the goods; as the weighing of an article forming part of a bulk, and sold by weight.

But if the identity and quantity are ascertained, as where the oats in a particular bin, which contains nothing else, are sold, and a bill accepted at the same time for the price, the property vests, and the vendor cannot afterwards stop in transitu. Although the delivery order describes the goods by the weight as well as the bin ("1028 bushels of oats in bin 40"), and directs the warehouseman to weigh them over. *Swanwick v. Sothorn*, 895

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ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS,
AND
Exchequer Chamber.

By JOHN SCOTT, OF THE INNER TEMPLE, Esq.,
BARRISTER AT LAW.

VOL. III.

**EASTER AND TRINITY TERMS, 6 WILLIAM IV., AND MICHAELMAS
TERM, 7 WILLIAM IV.**

1836.

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1857.

JUDGES

OF

THE COURT OF COMMON PLEAS,

DURING THE PERIOD OF THESE REPORTS.

The Right Hon. Sir NICOLAS CONYNGHAM TINDAL, Knt., Ld. C. J.

Hon. Sir JAMES ALLAN PARK, Knt.

The Right Hon. Sir JOHN BERNARD BOSANQUET, Knt.

The Right Hon. Sir JOHN VAUGHAN, Knt.

Hon. Sir THOMAS COLTMAN, Knt.

The Right Hon. THOMAS ERSKINE.

ATTORNEY-GENERAL

Sir JOHN CAMPBELL, Knt.

SOLICITOR-GENERAL

Sir ROBERT MOUNSEY ROLFE, Knt.

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COURT OF COMMON PLEAS,
IN
Easter Term,
IN THE
Sixth Year of the Reign of William IV.—1836.

DOE d. SWINTON v. SINCLAIR and Others.—p. 42.

On a reference to arbitration of an action of ejectment and all matters in difference between the parties, the arbitrator directed that a sum of 50*l.* should be paid by the lessor of the plaintiff to the defendants by way of compensation for certain buildings erected by them, and that a verdict should be entered for the former. On motion, the Court directed the sum awarded to the defendants to be set off against the costs of the lessor of the plaintiff, saving the lien of their attorney.

THIS was an action of ejectment, which, with all matters in difference between the parties, had been referred to an arbitrator, who had directed the verdict to be entered for the lessor of the plaintiff, but awarded two sums of 30*l.* and 20*l.* to be paid by him to the defendants by way of compensation for certain buildings erected upon the demised premises.

G. T. White, in the last term, obtained a rule, on the part of the lessor of the plaintiff, calling upon the defendants to shew cause why the sums so awarded to them should not be set off against the costs in the cause.

Humfrey and *Heaton* shewed cause.—They produced an affidavit wherein it was sworn that a greater sum than 50*l.* was due from the defendants to their attorney; and they submitted, that, inasmuch as the payment of the money was made a condition by the award, it should have been paid before any question as to costs could arise, and therefore that, even as between the parties to the suit, it could not properly form the subject of a set-off; but that, at all events, inasmuch as it was sworn that the attorney's lien exceeded the sum awarded to the

defendants, he was entitled to retain it as against all parties. They cited and relied on the cases of *Newton v. Newton*, 1 M. & Scott, 366, 8 Bing. 202, 1 Dowl. 264, and *Watson v. Muskeil*, ante, Vol. 1, p. 286, 658, 1 New Cases, 366, 727, 2 Dowl. 10, and also referred to 1 Reg. Gen. Hilary Term, 2 Will. 4, s. 93, which provides that "no set-off of damages or costs between parties shall be allowed to the prejudice of the lien of the attorney for costs in the particular suit against which the set-off is sought."

G. T. White, in support of his rule.—As between the parties themselves, the set-off is clearly allowable—*Doe d. Hope v. Carter*, 1 M. & Scott, 516, 8 Bing. 330, (21 E. C. L. R. 308,) the only question is, as to how far it is affected by the attorney's lien. In *Howell v. Harding*, 8 East, 362, it was held that the plaintiff was entitled to set off interlocutory costs in the same cause payable by him to the defendant, against the debt and costs recovered by him on the final result of the cause, notwithstanding the objection of the defendant's attorney on the ground of his lien, which only attaches on the general result of the costs, &c. of the cause. *George v. Elston*, ante, Vol. 1, 518, 1 New Cases, 513, (27 E. C. L. R. 477,) 3 Dowl. 419, recognizes the principle laid down in *Howell v. Harding*: there, a verdict was found against one of three defendants and in favour of the other two, and this Court deducted the costs of the two out of the plaintiff's costs and damages against the one, without regard to the plaintiff's attorney's lien. And in *Figes v. Adams*, 4 Taunt. 632, it was held, that, if upon the reference of an action in this court, the arbitrator award the costs of a nonsuit to be paid by the one party, and a larger sum to be paid as a debt by the other party, the party awarded to pay the smaller sum is entitled to a set-off, without motion.

TINDAL, C. J.—It appears to me that this rule should be made absolute, saving the lien of the defendant's attorney for costs in the suit. The first question is, whether the sums awarded to the defendants in the nature of the damages can properly form the subject of a set-off. *Newton v. Newton* is an authority to shew that they may. There, by an order of *Nisi Prius*, it was agreed that a verdict should be entered for the plaintiff for nominal damages and the costs of the action, and that the plaintiff should pay the defendant a sum of 70*l.* due to her from him: and the Court permitted the 70*l.* to be set off against the costs in the cause. If the 50*l.* awarded in this case can properly be considered as in the nature of damages, there is an end of the question.

VAUGHAN, J.—The case seems to me to fall within the spirit of the rule referred to.

The rest of the Court concurring—

Rule absolute accordingly.

WELLS and Another v. PORTER.—p. 141.

The stock-jobbing act, 7 Geo. 2, c. 8, is confined to the stocks of this country.

Time bargains in foreign funds are not illegal or void at the common law.

If they were so, sensible that the broker employed in effecting them would still be entitled to sue for his commission in respect thereof.

ASSUMPSIT for 1500*l.* for work done by the plaintiffs for the defendant at his request, and for commission due and payable from the defendant to the plaintiffs in respect thereof; for 500*l.* paid by the plaintiffs for the use of the defendant at his like request; for 1000*l.* for interest for the forbearance by the plaintiffs at the defendant's request of divers monies due and owing from the defendant to the plaintiffs; and for 1500*l.* found to be due from the defendant to the plaintiff on an account stated between them.

The defendant pleaded (amongst other pleas), sixthly—as to the promise of the defendant as to the sum of 1183*l.* parcel of the sum of 1500*l.* in which the defendant was in the declaration alleged to be indebted to the plaintiffs for work done—that the said work so alleged to have been done by the plaintiffs was work done by the plaintiffs as brokers and agents in and about the making of divers contracts between the defendant and divers other persons for liberty to the defendant to put upon and to deliver, receive, accept, or refuse, certain public stocks of certain foreign states, that is to say, of the kingdoms of Spain and Portugal respectively, and certain parts, shares, and interests therein, the defendant and the other persons, parties to the contracts respectively, not being possessed of or entitled to the same, or any part thereof, in their own right, or in their own names, or in the name or names of a trustee or trustees to their own use; the plaintiffs at the time of paying the said monies well knowing that the defendant and the said other persons parties to the contracts respectively were not possessed of or entitled to the same, or any part thereof, either in their own name or in their own right, or in the name or names of a trustee or trustees to their use or in their right, &c.

Seventhly, as to the said sum of 1183*l.*, parcel, &c., that the said work so alleged to have been done by the plaintiffs was work done by them as brokers and agents in unlawfully negotiating, transacting, and intermeddling in the making and procuring to be made certain contracts and agreements for buying, selling, assigning, and transferring certain public stocks of certain foreign states, to wit, the kingdoms of Spain and Portugal respectively, and certain parts, shares, and interest therein, which the defendant and the other persons contracting, and on whose behalf the said several contracts and agreements were made to sell, assign, and transfer the same, were not, nor was any of them, at the time of the making of such contracts and agreements respectively, actually possessed of or entitled to, either in their own right or in their own names, or in the name or names of a trustee or trustees, or any other person or persons to their use or in their right; the plaintiffs at the time of the doing of the said work and of the making of the said contracts and agreements well knowing that the persons on whose behalf such contracts and agreements were respectively made were not nor was any of them possessed of or entitled to the said stocks, parts,

shares, or interests in respect of which such contracts and agreements were respectively made, in his, her, or their own name or names, or in the name or names of a trustee or trustees, or any other person or persons for their use or in their right, &c.

To these two pleas the plaintiffs demurred specially; assigning for causes—that the said pleas did not deny or confess and avoid the part of the declaration to which they were pleaded; that there was nothing in the said pleas or either of them to shew that the contracts therein alleged were illegal or void by reason of any statute or otherwise, or without consideration: and also that the said pleas were respectively double, and contained a twofold answer to so much of the declaration as they professed to answer; in this, to wit, that the defendant had in each of the said pleas pleaded and alleged that the said supposed contracts in the said pleas respectively mentioned were in the nature of puts and refusals, and also that the respective parties thereto were not at the time of making the same in any way possessed of or entitled to the said stock in respect whereof the said supposed contracts were made: and also, that the said sixth and seventh pleas were in other respects uncertain, informal, and insufficient, &c.

The defendant joined in demurrer.

Butt, in support of the demurrer.—The question is, whether or not the transactions out of which this action arises (time bargains in foreign funds) fall within the stock-jobbing act, 7 Geo. 2, c. 8—“An act to prevent the infamous practice of stock-jobbing.” That statute—after reciting that “great inconveniencies have arisen and do daily arise by the wicked, pernicious, and destructive practice of stock-jobbing, whereby many of his majesty’s good subjects have been and are diverted from pursuing and exercising their lawful trades and vocations, to the utter ruin of themselves and families, to the great discouragement of industry, and to the manifest detriment of trade and commerce”—enacts “that all contracts and agreements whatsoever which shall, from and after the 1st June, 1734, be made or entered into by or between any person or persons whatsoever, upon which any premium or consideration in the nature of a premium shall be given or paid for liberty to put upon, or to deliver, receive, accept, or refuse any public or joint stock or public securities whatsoever, or any part, share, or interest therein, and also all wagers and contracts in the nature of wagers, and all contracts in the nature of puts and refusals, relating to the then present or future price or value of any such stock or securities as aforesaid, shall be null and void to all intents and purposes whatsoever; and all premiums, sum or sums of money whatsoever which shall be given, received, paid, or delivered upon all such contracts or agreements, or upon any such wagers or contracts in the nature of wagers as aforesaid, shall be restored and repaid to the person or persons who shall give, pay, or deliver the same, who shall be at liberty, within six months from and after the making such contract or agreement, or laying any such wager, to sue for and recover the same from the person or persons to whom the same is or shall be paid or delivered, with double costs of suit.” And by the 2nd section parties sued for penalties under the act are compellable to answer on oath touching the contracts made by them. Foreign stocks are not mentioned in the act; and, being an act of a highly penal description, it is not to be pressed beyond that which can fairly be supposed to have been within the intention of the legislature.

At the time the act passed, foreign stocks were not known in this country. consequently the words "public or joint stocks or public securities," must clearly have been intended to comprehend only the public stocks of this kingdom. The precise point arose in *Henderson v. Bise*, 3 Stark. 158, (14 E. C. L. R. 174,) where it was expressly ruled by Lord Chief Justice ABBOTT that a trafficking in Columbian bonds was not within the statute. His lordship said he "was of opinion that the words 'public or joint stock' relate merely to stock of this country, and [the act] was made to prevent jobbing in the British funds. It did not appear what the nature of Columbian bonds was: it was probable that the trafficking in such instruments might be attended with as much mischief as jobbing in the funds of this country; and it might be desirable that a statute should be passed to restrain such practices; but, as they did not fall within the statute referred to, the plaintiff was entitled to recover." In *Mortimer v. Salkeld*, 4 Camp. 42, Lord ELLENBOROUGH ruled that a wager respecting the profits to be made by the contractors for a lottery could not be brought within the provisions of the statute: and the plaintiff there had a verdict, which was acquiesced in. It may be contended on the other side that the contracts in respect of which the plaintiffs claim the right to recover commission were void at common law, as being in the nature of wagers: but it is to be observed that the plaintiffs, who are third parties, do not seek to enforce those contracts, but merely to recover a compensation for work and labour bestowed by them at the defendant's request in the making of the contracts.

J. Manning, contra.—The contracts out of which arises the plaintiffs' claim to recover in this action are clearly void and illegal both at common law and by the statute.

First, as to the statute—It is assumed on the other side, that, at the time of the passing of the statute 7 Geo. 2, c. 8, foreign stocks were unknown in this country. This, however, is erroneous; for, it is clear matter of history that stocks existed in France and in Holland long before their formation here, and that the stocks of those countries were the subject of purchase and sale here long before the reign of William the Third. (a) The words of the act are "any public or joint stock or public securities:" and supposing the term "public or joint stock" applies to British stocks only, surely "public securities" must be held to include as well Spanish and Portuguese stocks as those of our own country. The preamble affords a key to the meaning of the framers of the act; it recites that "great inconveniences have arisen and do daily arise by the wicked, pernicious, and destructive practice of stock-jobbing, whereby many of his majesty's good subjects have been and are diverted from pursuing their lawful trades and vocations, to the utter ruin of themselves and families, to the great discouragement of industry, and to the manifest detriment of trade and commerce." The act is intitled "An act to prevent the infamous practice of stock-jobbing." What difference in degree of infamy can there be between jobbing in our own or in foreign funds? Two *Nisi Prius* cases have been relied on to show that transactions of the kind in question are not within the act, viz. *Henderson v. Bise* and *Mortimer v. Salkeld*. The argument in *Hen-*

(a) The practice of funding appears to have been introduced by the Venetians and Genoese in the sixteenth century. The establishment of funds was not introduced in this country until after the revolution in 1668.

derson v. Bise turned on the 7th section of the act which *impose* (but does not *require*) the bonâ fide purchasers of stock to purchase when the seller refuses to deliver the stock which he has contracted to sell. The objection taken was, not that the defendant (the vendor) was possessed of no Columbian bonds at the time he contracted to sell them to the plaintiff; but that the contract was void under the statute, the plaintiff not having purchased the stock before the commencement of the action; which clearly was not necessary in order to enable him to maintain the action, and the omission to do which could not render the contract void. The opinion of ABBOTT, C. J., therefore, was wholly extrajudicial. *Mortimer v. Sulkeld* was a case arising out of a wager as to the profits of a lottery, and therefore totally beside any question as to gambling in the funds.—Then, the statute is declaratory only of the infamy of the already existing practice of stock-jobbing. [TINDAL, C. J.—The word “enact” only is used in the statute.] Can an act which the statute designates as “infamous, wicked, pernicious, and destructive,” be held legal? or can it be held to be illegal only with reference to the prospective enactments of the statute? [TINDAL, C. J.—The statute clearly is prospective only: it enacts a new state of the law.] Though not within the direct purview of the act, gambling or jobbing in foreign funds is within the mischief intended by the act to be remedied. The point also arose in a case of *Rossum v. Taylor*, (Chitt. Stat. 1022, n.,) tried before DALLAS, C. J., at Guildhall, in 1823. There, the plaintiff sued for differences in dealings in Spanish stock, and the learned judge said that the question ought to undergo the consideration of a full Court. Several other objections were taken, but the plaintiff had a verdict, and leave was reserved to the defendant to move to enter a nonsuit, which was accordingly done in the following term. DALLAS, C. J., on granting the rule, said: “This is a case of stock-jobbing in the foreign funds, and not in our own: in my present opinion, it is not the less gambling because it is in this or that stock; however, Sir John Bernard’s act is nominally applicable to the British funds only. But what is the title of that act? It is an act to prevent the infamous practice of stock-jobbing. The legislature, therefore, has pronounced the act infamous. The question, therefore, upon that point is still open.” The case underwent no further discussion, a compromise having been effected between the parties. That, in the opinion of Lord TENTERDEN, such a contract would be illegal and void at common law, is clear from the case of *Bryan v. Lewis*, R. & M. 386, (21 E. C. L. R. 467,) a case that occurred about three years after that of *Henderson v. Bise*. His lordship there said: “I have always thought, and shall continue to think until I am told by the House of Lords that I am wrong, that, if a man sells goods to be delivered on a future day, and neither has the goods at the time nor has entered into any prior contract to buy them, nor has any reasonable expectation of receiving them by consignment, but means to go into the market and to buy the goods which he has contracted to deliver, he cannot maintain an action upon such a contract: such a contract amounts, on the part of the vendor, to a wager on the price of the commodity, and is attended with the most mischievous consequences.” And in Chitty on Contracts, 2nd edit. p. 332, n., the same learned judge is said to have ruled on a still later occasion, that, “if two persons enter into a contract under the semblance of a sale of goods, not intending really to buy or sell the commodity, but merely as a gambling specula-

tion, and to pay the difference of the market price on a particular day *like a time bargain in the stocks*, such a contract is illegal and void at common law, and no action will lie to enforce it." This is a much stronger case than that. And if the transactions themselves were illegal and void, the brokers are not entitled to maintain an action against their principal for monies paid by them on account, or for commission in respect thereof—*Clayton v. Dilly*, 4 Taunt. 165; *Josephs v. Pebrer*, 3 B. & C. 639, 5 D. & R. 542, 1 C. & P. 507, (10 E. C. L. R. 209.)

Butt, in reply.—Unless it be clearly apparent that foreign stocks were intended to be embraced by the statute, or if the words of the act are satisfied by confining its operation to the funds of this country, foreign stocks cannot be held to be within it. The words "other securities" can have reference only to securities of the like kind with those before intended by "public or joint-stocks." The same public securities are meant throughout the act; and the 10th section, which relates to purchases of stock by the accountant-general, puts the matter beyond doubt, that officer having no power to deal with any other than the British funds. *Henderson v. Bise*, as far as its authority goes, and also *Rossum v. Taylor*, shew that this case is not within the statute. The question here is, whether these contracts are within the words and meaning of the statute, not merely whether they are within the mischief it was intended to remedy: *Mortimer v. Salkeld* was cited for the mere purpose of showing that the case there put was as much within the mischief of the act as this can be. Unless avoided by the statute, dealings in the nature of time bargains are perfectly legal. There are no words in the act declaratory of the illegality of the practice at common law. *Bryan v. Lewis* decided nothing: and the opinion there expressed by Lord TENTERDEN is not warranted to the extent to which it goes by any case to be found in the books. Even if it were good to the fullest extent, it is no authority to show that the brokers employed would not be entitled to maintain an action for their work and labour. *Clayton v. Dilly* merely decided that a plaintiff who by the defendant's authority lays illegal bets in the defendant's name, and, losing, pays them without a subsequent express direction so to do, cannot recover from the defendant the amount of the money so paid. Here, it is admitted on the record that the work was done *at the request of the defendant*. The contracts, however, being clearly not illegal either at common law or under the statute, the plaintiffs are entitled to judgment.

TINDAL, C. J.—It appears to me that the pleas now under consideration do not furnish any answer to the declaration. The action is brought for work and labour and commission. The pleas state that the work alleged to have been done by the plaintiffs was work done by them as brokers and agents in making illegal contracts for the sale and transfer of foreign stocks, in which none of the contracting parties were at the time interested—in effect, pleas of the stock-jobbing act; and affording a complete answer to the action if foreign stocks or funds are within that act. Looking at the words of the statute, it appears to me that foreign stocks are not within either its words or meaning. In the first place, the statute was passed with a view to prevent a common practice that had been found to be destructive of the interests of the country. The title and preamble of the act sufficiently show that its object was to put down a practice that had become extremely general and in its consequences pernicious. Before the passing of the act in

question many statutes had existed relating to the public stocks of this country, which show that there was a subject-matter upon which this statute could operate. But there is no evidence before us of the then existence of any foreign stocks. If the defendant intended to rely on the fact of the existence of other funds besides English funds at the time of the passing of the 7 Geo. 2, c. 8, he should at least have averred that fact. Seeing what the statute might and did relate to, viz. English stocks, and having no judicial knowledge or information to show us that it could have been intended to embrace stocks of any other country, I feel myself bound to hold that the former only are within the act. Besides, the statute carries with it consequences highly penal: it imposes a penalty on parties guilty of the acts prohibited, and also renders them liable, by a bill in equity filed against them, to answer on oath touching the contracts they may have entered into. A statute so penal in its nature is not to be enlarged beyond the fair and obvious meaning of the words employed to express the intention of the legislature. The act containing no expressions to induce us to suppose it was designed to embrace any other than the stocks of this country, I think we should not be warranted in holding any others to fall within it. The 10th section contains a provision applicable to sales of stock with the privity of the accountant-general of the Court of Chancery. Hence it would seem clear that the stocks of this kingdom only were the subject of legislation; for, it is well known that no purchases or sales of stock are made under the authority of the accountant-general other than domestic stocks. This, undoubtedly, is not a conclusive argument on the subject; but it is not by any means an unusual or improper rule, in the construction of a statute, to call in aid an exception. For these reasons it appears to me that, as far as the statute is concerned, time bargains in foreign stocks are not illegal.—It has been contended, however, that such transactions constitute an offence at common law, and therefore not capable of being made the foundation of an action like the present. The words of the statute are words of enactment, not declaratory of the common law: and it would be too much to say that an action for work and labour could not be maintained in respect of work done by a broker or agent in the making of a contract which is not illegal, but at the most void. It is enough for the present purpose to say that I do not see my way with sufficient clearness to hold the transactions in question illegal at common law; and therefore I think the plaintiffs are entitled to judgment.

PARK, J.—I am of the same opinion. Two questions arise in this case—first, whether contracts called time bargains in foreign stocks (Spanish bonds) are by the statute made illegal—secondly, whether they are illegal at common law. Upon a full consideration of the statute, and of the authorities to which our attention has been more particularly called, I am of opinion that such transactions are not within the statute. It is clear, that, where a statute says nothing to the contrary, it applies only to the subjects of, and to contracts made in, this country. There is nothing in this act to show that it was intended to apply to foreign funds. The 10th section is not without its weight in the construction of a statute that has not before received a distinct judicial interpretation. That section relating to the sale of stocks by an officer who is authorized only to deal with the stocks of this country, affords, in my judgment, a strong presumption that such only were the

stocks to which the statute was intended to apply. There are cases in the books in which the subject has come under consideration. In *Henderson v. Bise*, 3 Stark. 158, (14 E. C. L. R. 174,) Lord Chief Justice ABBOTT expressed himself of opinion that the act applied only to the stocks of this country. The only authority that at all impugns that opinion is the dictum of Lord Chief Justice DALLAS in *Russum v. Taylor*: his lordship seems to have been inclined to think that foreign stocks are within the act: he says—"This is a case of stock jobbing in the foreign funds, and not in our own: in my present opinion it is not the less gambling because it is in this or that stock; however, Sir John Bernard's act is nominally applicable to British funds only. But, what is the title of that act? It is an act to prevent the infamous practice of stock-jobbing. The legislature, therefore, has pronounced the act infamous. The question, therefore, upon that point is still open." *Rossum v. Taylor* is not an authority to be opposed to *Henderson v. Bise*; it was afterwards settled without coming before the Court.—With respect to the second point—I do not find any authority for holding transactions like those out of which this action arises to be illegal at common law. If the legislature had so understood at the time of passing the 7 Geo. 2, c. 8, some intimation to that effect would doubtless have been found in its preamble. The preamble, however, merely recites the fact of the existence and daily increase of a pernicious practice, to *prevent* which the legislature proceeded to enact that the contracts therein described shall, from and after a given day, be null and void, and the parties offending subjected to certain penalties. Although I do not approve of the practice of gambling in foreign funds, still I cannot perceive that it is an offence at common law so as to disentitle the broker making the contracts to maintain an action for his commission.

VAUGHAN, J.—I am also of opinion that making what are called time bargains in the foreign funds is not an offence either at common law or by the statute. In *Billing v. Flight*, 2 Marsh. 124, 6 Taunt. 419, (1 E. C. L. R. 433,) the 7 Geo. 2, c. 8, was held to be a remedial rather than a penal act: but it cannot be denied that some of its clauses are in the highest degree penal; and I think there is nothing in its language to show that it was intended to apply to foreign stocks. Then, was this an offence at common law? No authority has been adduced to show that it has ever been so held; though it cannot be supposed that foreign stocks did not exist at the time this statute passed. The act is prospective in all its provisions. It must be remembered, too, that the plaintiffs are one step removed from a participation in the offence, if it were an offence.

BOSANQUET, J.—I am of opinion that the contract upon which the plaintiffs have declared is not void or illegal either by the common law or by the statute. The statute imposes penalties for the commission of those practices it was framed to prevent, and therefore is not to be extended beyond the strict and fair meaning of its words. Notwithstanding the recital the act is still prospective, and not declaratory of what the law was before its passing. The statute speaking generally of public stocks or securities, must necessarily be understood to mean the public stocks or securities of this country only. I cannot say that I rely upon the 10th section of the act so much as the rest of the Court seem to do: it would have been equally necessary to insert the exception

whether the statute embraced foreign funds or not. But we have the authority of Lord TENTERDEN that Columbian bonds are not within the act; and that is the only express judicial opinion upon the point.—Then, are transactions of this nature illegal at common law? The contract here is for work and labour stated in the declaration to have been performed at the request of the defendant: and this is admitted by the pleas. The authority of Lord TENTERDEN in *Bryan v. Lewis* has been pressed upon us to show that this contract is of such a nature as to be void at common law. The decision, however, in that case did not turn upon that point: that for which it is cited is a mere dictum of Lord TENTERDEN; and the circumstances of the case were such that one cannot feel surprised at a strong expression of opinion on the part of the judge. His lordship says—"I have always thought, and shall continue to think, until I am told by the House of Lords that I am wrong, that, if a man sells goods to be delivered on a future day, and has neither the goods at the time, nor has entered into any prior contract to buy them, nor has *any reasonable expectation of receiving them* by consignment, but means to go into the market and to buy the goods which he has contracted to deliver, he cannot maintain an action upon such a contract: such a contract amounts, on the part of the vendor, to a wager on the price of the commodity, and is attended with the most mischievous consequences." Comparing that opinion with what appears upon this record, it will be seen that there is a material distinction between the two cases. There the vendor had no reasonable expectation of getting the goods he contracted to deliver: here the plaintiffs were merely employed as brokers or agents, and the pleas do not negative the power of the vendors to become possessed of the stock, or aver the plaintiffs' cognizance of the vendors' want of power to become possessed. This is material when the opinion of the same learned judge in the former case is remembered, viz. that foreign stocks are not within the 7 Geo. 2, c. 8. Independently of this, I am not prepared to say that the plaintiffs are not entitled to recover in this action a compensation for their work and labour. The contracts upon which the labour was bestowed might be void: but still it would by no means follow that the brokers by whom the contracts were made would be precluded from recovering their commission.

Judgment for the plaintiffs.

LYNG v. SUTTON.—p. 187.

Where a cause is referred and a verdict entered, a motion to impeach the award must be made within the first four days of the following term.

HOOPPELL v. LEIGH.—p. 188.

Upon writs of inquiry before the sheriff, where the damages are under 20*l.*, the costs are taxed on the same scale as upon trials before the sheriff.

COLE and Another v. LE SOUEF and Another.—p. 188.

In *assumpsit* for money paid to the use of the defendants, they pleaded specially circumstances showing that the policy of insurance in respect of which the payments were made had been so framed as to be utterly unavailing. Upon special demurrer, on the ground, amongst others, that the plea was argumentative and amounted to the general issue—The Court inclined to think the plea good, but allowed the plaintiff to withdraw his demurrer and reply *de novo*, without costs.

ASSUMPSIT for money paid, for interest, and for money due upon an account stated.

Pleas—first, non *assumpsit*—secondly, as to 173*l.* 5*s.* parcel of the sums of money in the first and third counts mentioned, and the promises in the declaration mentioned so far as related to the said sum of 173*l.* 5*s.*—that, theretofore, and before the plaintiffs were retained or employed as thereafter mentioned, certain goods of a large value, to wit, of the value of 5000*l.*, had been and were at London shipped and loaded in and on board of a certain ship or vessel called the Pomono, to be carried and conveyed therein from London aforesaid to Falmouth, and from thence on a voyage to a certain place beyond the seas, to wit, to Oporto, and that the defendant, before and at and after the time of retaining and employing the plaintiffs as thereafter mentioned, were interested in the said goods to a large value and amount, to wit, to the value and amount of all the moneys which they retained and employed the plaintiffs as thereafter mentioned to cause to be insured thereon; of all which several premises the plaintiffs before and at the time of their being retained and employed as thereafter mentioned, to wit, on &c., had notice: that, before and at the time when the plaintiffs were retained and employed as thereafter mentioned, the plaintiffs were insurance brokers, and used, exercised, and carried on the business and employment of insurance brokers; and thereupon, theretofore, to wit, on &c. last aforesaid, the defendants, at the plaintiffs' request, retained and employed the plaintiffs as insurance brokers and agents in that behalf, for compensation and reward to them in that behalf, to effect and cause to be made for the benefit of the defendants an insurance to the amount of a certain sum of money, to wit, 2,000*l.* upon the said goods in the said ship or vessel, upon and for the said voyage from Falmouth to Oporto; which said retainer and employment the plaintiffs then accepted, and in consideration of the premises then promised the defendants to do and perform their duty as such brokers and agents as aforesaid in that behalf; and thereupon it then became and was the duty of the plaintiffs as such brokers and agents of the defendants as aforesaid, to use due and proper care and skill in and about the effecting and causing to be made such insurance as aforesaid: that the plaintiffs, well knowing the premises, and that the said goods had been shipped and loaded at London as aforesaid, and not at Falmouth as aforesaid, but neglecting their duty in that behalf, did not nor would use due or proper skill in and about the effecting and causing to be made the same insurance, but wholly neglected so to do, and, on the contrary thereof, as and for the purpose of effecting such insurance as aforesaid, carelessly, negligently, unskilfully, and improperly effected and caused to be made two policies of assurance, to wit, &c., which policies, by reason of the carelessness, negligence, and want of skill of

the plaintiffs in that behalf, were worded and expressed in such words and manner as not to be, and the same were not, nor was either of them, applicable or adapted to an insurance upon the said goods or any goods shipped and loaded in and on board of the said ship or vessel at London aforesaid; by means whereof the said policies of assurance did not nor did either of them operate, and were not, nor was either of them, an insurance upon the said goods or upon any part thereof: and thereby the defendants were prevented from having, and never had, any insurance on the said goods or any part thereof, or any indemnity, benefit or advantage whatever of or from the said policies of assurance, and the said goods, by means of the premises, and of the carelessness, negligence, and want of skill and improper conduct of the plaintiffs as such insurance brokers and agents of the defendants in that behalf as aforesaid, were wholly uninsured of or for the said voyage from Falmouth to Oporto: and that the said sum of 173*l.* 5*s.* was and is the amount of certain premiums of insurance and expenses upon, of, and relating to the said policies of assurance, and paid and incurred by the plaintiffs in and about and relative to the same, and the effecting and causing the same to be made—verification.

To the first plea the plaintiffs added the similitur, and to the second demurred specially, assigning for causes—that the defendants in and by their said second plea specially pleaded and relied upon matter amounting in effect to a general traverse of the promise laid in the declaration as far as such promise related to the causes of action in the commencement of that plea referred to—that the plea was a multifarious, argumentative, and insufficient mode of pleading the plea of non assumpsit to the last-mentioned causes of action—that the said second plea concluded with a verification, and purported to be a special plea in avoidance of the last-mentioned causes of action, without in any manner confessing even a *prima facie* or colorable title or right of action in the plaintiffs—that the said second plea did not state any fact which arose after the causes of action which it professed to answer had accrued to the plaintiffs, nor did it contain any matter of law in answer to the last-mentioned causes of action, nor did it state any matter of law or of fact in avoidance of any or of any part of the causes of action in the declaration alleged—that the said second plea contained material allegations at variance and inconsistent with each other, inasmuch as it contained averments showing that the sum of 173*l.* 5*s.* therein and in the declaration mentioned was paid by the plaintiffs as and for certain premiums of insurance and expenses paid and incurred in consequence of the retainer of the defendants, and yet attempted to state and to tender for issue certain facts from which it was sought to be inferred that the same payments and expenses were made and incurred in the plaintiffs' own wrong, and without any request, retainer, or instructions of or from the defendants—that, in and by the said second plea, it was admitted that there was an account stated between the plaintiffs and defendants as in the declaration alleged, and it was also implied and admitted that the said sum of 173*l.* 5*s.* was an item in such account, and that upon such account a balance to that amount remained to the credit of the plaintiffs; and yet in and by the said second plea there was not shown any matter or matters in avoidance of or as a set-off against the said item or sum of 173*l.* 5*s.*, but, in a subsequent part of the plea, it was attempted to be shown that the said sum of 173*l.* 5*s.* never was a valid debt ir.

account or otherwise from the defendants to the plaintiffs, and it was stated in effect, notwithstanding the implied admission of the said account and of the said sum of 173*l.* 5*s.* being such balance as aforesaid, that the said sum of 173*l.* 5*s.* consisted of certain payments made by the plaintiffs in their own wrong, and not at the request of the defendants, and for which said sum of 173*l.* 5*s.*, or any part thereof, it was attempted in and by the said second plea (but in an argumentative, indirect, and insufficient manner) to be shown that the defendants never were or ought to be liable to the plaintiffs—and that the said second plea contained various allegations upon no one of which could the plaintiffs take issue without thereby admitting the truth of the other allegations in the plea, which, though wholly false or unfounded, would materially embarrass the plaintiffs on the trial of the cause, and in the recovery of their demand.—Joinder.

J. Manning, in support of the demurrer.—The plea is bad inasmuch as it does not confess and avoid the matters alleged in the declaration, and merely amounts to the general issue. It does not fall within either of the cases that form an exception to the general rule that that which may be given in evidence under non assumpsit cannot be pleaded specially. These exceptions are, first, where the matters alleged in the declaration are confessed by the plea and avoided by matters *ex post facto*; secondly, where the matters alleged are avoided by matter of law, that is, by matters of fact involving matters of law—*Carr v. Hinchcliffe*, 7 D. & R. 42, 4 B. & C. 547, (10 E. C. L. R. 408;) *Muggs v. Ames*, 1 M. & P. 294, 4 Bing. 470, nom. *Muggs v. Anson*, (15 E. C. L. R. 45.) The new rule of Hilary Term, 4 Will. 4, s. 1, which provides, that, “in all actions of assumpsit, except on bills of exchange and promissory notes, the plea of non assumpsit shall operate only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law,” leaves the matter just where it was. Here, the plaintiffs declare for money paid to the use of the defendants. Under non assumpsit the defendants might have given in evidence any thing to show that the money was not in fact paid to their use. [TINDAL, C. J.—You might have put in a replication denying the whole of the matters alleged in the plea.] It may admit of great doubt whether we could safely have replied *de injuria*. We might have been embarrassed by the admission of some of the facts alleged in the plea. [TINDAL, C. J.—The defence is, that the policy in respect of which the alleged payments were made was so framed by the plaintiffs as to be utterly useless to the defendants: if so, why may not that form the subject of a special plea? I think you had better amend.]

Manning expressed his willingness to amend without costs: but this was not acceded to by the other side.

Burstow, *contrà*.—It is by no means clear that this would not have been a good plea before the new rules. *Muggs v. Ames* is an authority in its favour. But, at all events, since these rules, there can be no doubt. The general policy of the new rules was to encourage the putting of defences specially upon the record. Under non assumpsit, the proposed defence would have been excluded. The third rule, in assumpsit, provides that, “in every species of assumpsit, all matters in confession and avoidance, including not only those by way of discharge, but those which show the transaction to be either void or voidable in

point of law, on the ground of fraud or otherwise, shall be specially pleaded." Here the transaction is *voidable* in consequence of the neglect of the defendants.

LINDAL, C. J.—The plea admits an account stated in point of fact after the transaction was closed. For anything that appears, the defendants are not damnified. I think the plaintiffs should have leave to withdraw their demurrer, and reply *de novo*, without payment of costs.
Rule accordingly.

GIBSON and others, Assignees of GREEN, a Bankrupt, v. BOUTTS.
—p. 229.

Whether or not a voluntary payment made by a trader in insolvent circumstances and on the verge of bankruptcy to a particular creditor, is void as being a fraud upon the bankrupt laws, is a question of fact for the jury, depending upon the mind and intention of the party at the time of making the payment, to be collected for the surrounding circumstances. If his condition and conduct be such as to evince clearly a contemplation on the part of the trader that his embarrassments *must* of necessity end in *bankruptcy*, the jury will not be warranted in coming to any other conclusion than that the transaction is fraudulent. But, inasmuch as every man has down to the time of committing the act of bankruptcy the sole right of dominion over his property, such a payment cannot be held to be a fraudulent preference where the bankrupt at the time of making it appears to entertain a *bonâ fide* hope or expectation that he may be extricated from his difficulties without being made a bankrupt.

ELIZABETH SMITH v. MARGARET KINGSFORD.—p. 279.

The plaintiff, a domestic servant, entered into the defendant's service on the 19th November. On the 15th January, her mistress caused her to be taken before a magistrate on a charge of stealing some small articles of plate: the magistrate remanded her till the 20th, when she was again brought up, and discharged. On the 22nd, the plaintiff went to demand her clothes and wages, including 1*l.* 1*s.* in lieu of a month's warning. The defendant tendered 2*l.* 2*s.* for the two month's actual service, but refused to pay the additional guinea:—*in* fact, that, inasmuch as the placing the plaintiff in custody on a charge that was afterwards abandoned was no dissolution of the contract of hiring, the plaintiff was under the circumstances entitled to wages for the third month, which had been entered upon; and that the whole might be recovered under the common count for work and labour.

INDEBITATUS *assumpsit* for work and labour, and for money due upon an account stated. Pleas—first, non-*assumpsit*, as to all but 2*l.* 2*s.*—secondly, as to the said sum of 2*l.* 2*s.*, a tender of that sum; which was brought into court, and taken out by the plaintiff—thirdly, as to the sum of 1*l.* 1*s.*, parcel &c., that, before and at the time of her dismissal and discharge thereafter mentioned, the plaintiff was in the defendant's service in the capacity of a cook, at the yearly wages of 12*l.* 12*s.*; that theretofore, and during the first year of such service, and before such dismissal and discharge as aforesaid, to wit, on the 14th January, 1836, the plaintiff conducted herself improperly as such domestic servant, in this, to wit, that the plaintiff, without the defendant's knowledge or consent, and against her will, wrongfully introduced into the defendant's dwelling house, in which the plaintiff was employed, two men and one woman whose names and persons were unknown to the defendant, and harboured and entertained such persons, and then wrongfully kept and harboured the said persons during unreasonable hours, to wit, from eight o'clock in the evening until one o'clock the following morning, without the defendant's knowledge or consent.

and that, during the said time the said persons were so in the said house, twenty-nine silver tea-spoons, of the value of 10*l.*, of the defendant, were in that part of the house where the said persons were, and it was then the duty of the plaintiff to take due care of the same and prevent the same from being lost or purloined; yet the plaintiff, during the time the said persons were in the said house as aforesaid, conducted herself so negligently and improperly, that, on the night aforesaid, six of the said spoons were feloniously and unlawfully taken from the said house, and were lost to the defendant, by reason of such misconduct as aforesaid; and the plaintiff during the time of her being in such service, behaved and conducted herself in an improper and negligent manner: wherefore the defendant, after the said loss of the said spoons had been discovered, and before the expiration of the first year of such service, and before such first year's wages became due, dismissed and discharged the plaintiff from such service as aforesaid: and the defendant further said that the said sum of 1*l.* 1*s.* was and is a sum due from the defendant to the plaintiff in respect of wages for a portion of the said first year, and which accrued after such dismissal and discharge, and not otherwise; and that the plaintiff, from such dismissal, hath continued discharged from the service of the defendant.

The plaintiff joined issue on the first and second pleas, and to the last replied that the defendant, of her own wrong, and without the cause by her in her said last plea alleged, dismissed and wholly discharged the plaintiff from her said service, and from the said dwelling-house.

At the trial before the under-sheriff of Middlesex, the following facts appeared in evidence:—The plaintiff entered into the service of the defendant on the 19th November, 1835, in the capacity of cook, at yearly wages of 12*l.* 12*s.* On the evening of the 14th January, 1836, without the knowledge of her mistress, the plaintiff, at her mistress's expense, entertained two men and a woman. On the following morning, six silver tea-spoons belonging to the defendant were missed, and, in consequence of what had occurred on the previous evening, the plaintiff was suspected of having stolen them or been accessory to the theft, and was taken before a magistrate, who remanded her for a further examination. After being detained in the house of correction for five days, the plaintiff was (on the 20th January) again brought up, and discharged. The plaintiff on the 22d demanded of the defendant 2*l.* 2*s.* for two months' wages, and 1*l.* 1*s.* in lieu of a month's warning: the defendant tendered the 2*l.* 2*s.*, but refused to accede to the latter demand; whereupon the plaintiff brought this action. The plaintiff's clothes were taken away by her on the 22nd of January.

On the part of the defendant it was contended, that she was under the circumstances justified in dismissing the plaintiff without warning; and that the common count for work and labour was insufficient to cover the plaintiff's claim for the period during which no service had been performed—*Archard v. Horner*, 3 C. & P. 349, (14 E. C. L. R. 342,) where it was ruled by Lord TENTERDEN, that, if the contract between master and servant be the usual one for a year, determinable at a month, the servant, if turned away improperly, cannot recover on a count stating the contract to have been for an entire year; and that he cannot, on the common count for wages, recover for any further period than that during which he had served.

A verdict having been found for the defendant on the issue on the second plea, and for the plaintiff on the first and third, damages 1*l.* 1*s.*—

C. Jones, on a former day in this term, (pursuant to leave,) obtained a rule nisi that the general verdict might be entered for the defendant, or that a new trial might be had.

Byles showed cause.—It stands admitted upon the record that the plaintiff entered the defendant's service under a yearly hiring; and it appeared from the evidence that the service commenced on the 19th November, 1835, and was not finally interrupted until the 22nd January, 1836—for, the placing her in custody under a charge that was afterwards abandoned, was not a dissolution of the contract of hiring. Although, therefore, it is true, that, where the plaintiff claims a compensation for constructive work and labour only, the common count is inapplicable, but, there being no actual service, the declaration must be special: yet here, inasmuch as there has been an actual service for three or four days of the third month, the whole may be recovered under the common count. If it were otherwise, a servant who is absent for a short period on account of sickness, or having a holiday, would be disabled from recovering wages on the common count, by reason of this partial interruption of the actual service. In *Gandall v. Pontigny*, 1 Stark. 198, 4 Camp. 375, (2 E. C. L. R. 354.) A., being employed by B. as a clerk at a salary of 200*l.* per annum, payable quarterly, was discharged in the middle of a quarter, and paid proportionably; and Lord ELLENBOROUGH held that he was entitled to recover his salary for the remainder of the quarter under the general count for work and labour. That case was recognized and acted upon by this Court in *Collins v. Price*, 2 M. & P. 233, (15 E. C. L. R. 389.) (a) There, the plaintiff kept a day school at which the defendant's daughter was the only boarder. At the end of the first quarter, the plaintiff's charge for schooling was sent to the defendant and discharged. Four days after the commencement of the second quarter, the child was taken ill and sent home, and did not return to school again. It was held that the defendant was liable for the whole quarter, although there was no express contract for a quarter's notice previously to the removal of the child. And PARK, J., commenting upon *Gandall v. Pontigny*, says: "It was contended for the defendant that the plaintiff was not entitled to recover on the general count for work and labour, since none had been performed subsequently to the period of the discharge, and that, up to that time, the plaintiff had been paid, and the case of *Hulle v. Heightman*, 2 East, 145, was cited, and it was urged that the plaintiff ought to have declared specially on the contract: but Lord ELLENBOROUGH said, 'If he has done work for any part of the quarter, it is done for the whole. This is an objection of a strict nature, and since no dissolution of the contract has been proved, the plaintiff is entitled to recover for the remainder of the quarter.' That appears to us to be expressly applicable to this case."

C. Jones, in support of his rule.—After the 15th January there was no service either actual or constructive: the placing the plaintiff in custody on a charge of stealing was the strongest possible mode of putting an end to the relation of mistress and servant. The cases cited on the other side suppose the absence of misconduct in the servant, and no reasonable ground of dismissal. [BOSANQUET, J.—The finding of the (a) And see *Beaston v. Collyer*, 4 Bing. 309, 12 Moore, 552, 2 C. & P. 607, (13 E. C. L. R. 444.)

jury in this case negatives the charge of misconduct: the dissolution of the contract must be assented to by both parties.] The conduct of the plaintiff sufficiently shows her assent to the determination of the contract: she was discharged from custody on the 20th January, and did not return to the defendant's house until the 22d. *Archard v. Horner* is a distinct authority to show that the form of declaring adopted in this case is improper.

TINDAL, C. J.—It appears to me that the mere causing the plaintiff to be sent to prison upon a charge that was subsequently abandoned, was not a dissolution of the contract of hiring. However little in degree the relation of mistress and servant between these parties may have been, still I think the plaintiff entitled to recover for the month.

PARK, J., concurred.

BOSANQUET, J.—I am also of opinion that the contract in this case was not put an end to until the third month's service had been entered upon. The sending the plaintiff to prison was no more a putting an end to the contract than locking her up in a room of the house would have been.

Rule discharged. (a)

(a) See *Robinson v. Hindman*, 3 Esp. 235; *Spain v. Arnott*, 2 Stark. 256, (3 E. C. L. R. 339; *Sherman v. Bennett*, M. & M. 489, (22 E. C. L. R. 365;) *Atkin v. Acton*, 4 C. & P. 208, (19 E. C. L. R. 346;) *Callo v. Brouncker*, 4 C. & P. 518, (19 E. C. L. R. 504.)

GRAHAM v. BEAUMONT.—p. 287.

In showing cause against a rule, affidavits sworn after the day on which the rule is due may in general be used.

On a motion for costs under 43 Geo. 3, c. 46, s. 3, the amount of the verdict is not the criterion by which the discretion of the Court is to be guided.

BAYLEY v. HOMAN.—p. 384.

On demurrer to a replication, the Court will not permit the plaintiff to attack the defendant's plea, unless the point has been marked for argument pursuant to the rule of Hilary Term, 4 Will. 4, s. 2.

GOLDSMID and Another, Assignees of HIRSCHFIELD and WILKINSON, Bankrupts, v. RAPHAEL and Another.—p. 385.

Quærit whether in an action of tort against the sheriff, by the assignees of a bankrupt, for seizing goods of the bankrupt, the defendant may, without specially pleading them, give in evidence, payments necessarily made by him out of the proceeds, *in reduction of the damages*.

WEATHERHEAD and Another v. LANGLES.—p. 406.

The Court will permit judgment to be signed on a *sci. fa.* after eight days from the return, (r. 81, H. T. 2 Will. 4.) where the defendant resides abroad, he having had *reasonable notice of the proceeding*.

WORTHINGTON, and Mary, his Wife, v. WIGLEY.—p. 555.

After verdict for the plaintiff in debt on bond, (the defendant not appearing at the trial,) the Court granted a new trial on the ground that in the issue delivered the pleas were not dated, pursuant to the rule of Hilary Term, 4 Will. 4.

CASES
 ARGUED AND DETERMINED
 IN THE
COURT OF COMMON PLEAS,
 IN
Michaelmas Term,
 IN THE
 Seventh Year of the Reign of William IV.—1836.

The Judges who sat in Banc during this term were,
 TINDAL, C. J. GASELEE, J.
 VAUGHAN, J. BOSANQUET, J.

WRIGHT v. NEWTON.—p. 595.

In an action against an attorney for negligence in procuring insufficient security upon an advance of money, per quod the plaintiff lost the money : the Court allowed the defendant to plead, in addition to non assumpsit and several other pleas, that the loss was not the result of the alleged negligence.

THIS was an action of assumpsit against an attorney for an alleged breach of duty, in taking insufficient security for an advance of money on behalf of the plaintiff, a client. A summons had been taken out by the defendant, and heard before BOSANQUET, J., at chambers, for leave to plead the following pleas—1. non assumpsit—2. a denial of the retainer in the terms alleged in the declaration—3. a denial of the advance of the money under such retainer as alleged—4. a denial of the negligence imputed—5. a denial of the alleged insufficiency of the security—6. *a denial of the allegation that the plaintiff had been prevented from enforcing payment of the money advanced.* The learned judge gave the defendant leave to plead the first or the second, and the third, fourth, and fifth, but refused to allow the sixth. These pleas having been pleaded—

Wilde, Serjeant, now moved for leave to withdraw them, and to plead them again with the addition of those that had been disallowed, viz. the second and sixth.—If by pleading non assumpsit merely, the defendant admits the consideration, he is entitled to have the second plea put upon the record: if, on the other hand, non assumpsit puts in issue the consideration, which seems doubtful—*Passenger v. Brooks*, 1 Scott, 560—then the second plea would be unnecessary. [BOSANQUET, J.—*Passenger v. Brooks* was the case of an express promise. In an action for goods sold and delivered, the delivery of the goods is the consideration for the promise, and that is not traversed. (a) VAUGHAN, J.—The consideration is a matter of fact from which the promise is implied by law.] If there be an implied contract, to entitle the plaintiff to maintain the action, some special damage must be proved. In *Smith v. Thomas*, 2 Scott, 546, where a plea negating the special damage alleged in the declaration, was held bad, on demurrer, the action was slander for words actionable per se, and therefore the law would imply some damage. The present case, however, stands upon a different footing.

PER CURIAM.—The plea denying the special damage as alleged, may be added. But, with respect to the traverse of the consideration, non assumpsit will suffice.

No cause being shown, the sixth plea was accordingly added.

(a) See *Alexander v. Gardener*, 1 Scott, 281, where it was held, that, under non assumpsit to a count for goods bargained and sold, evidence may be given that the contract was made subject to conditions which had not been complied with on the part of the vendor.

DICAS v. SMITH, a Prisoner.—p. 600.

Where the regular notice of bail has been given, the Court will, under special circumstances, allow time for inquiry into their sufficiency, on payment of costs.

MONCK v. SHENSTONE.—p. 661.

Semole, that no rule to plead several matters is necessary in the case of pleas added under a judge's order.

DOE d. WOOD v. ROE.—p. 756.

On a motion by a landlord under the 1 Geo. 4, c. 87, s. 1, the rule should be drawn up on reading the original lease or agreement, or a duplicate or counterpart thereof, and not merely on reading a copy of the lease or agreement.

Where the agreement in such a case appeared to have been stamped after the rule nisi was obtained, the Court discharged the rule; holding that, to entitle him to a rule, the landlord must at the time of moving produce a perfect lease or agreement.

POOLE and Another v. EDWARD COATES, Executor of
THOMAS COATES, Deceased.—p. 768.

A demand of oyer must correctly describe the parties to the cause.

WYATT v. MACDONALD.—p. 768.

A notice to plead need not be dated : consequently, it will not be vitiated by an erroneous date.

THE declaration in this cause was dated the 7th November : the notice to plead was by mistake dated the 7th August, and required the defendant to plead “within four days from the service hereof.” Judgment having on the 12th November been signed for want of a plea—

Humfrey, on the 15th, obtained a rule nisi to set it aside for irregularity.

Wilde, Serjeant, showed cause.—The erroneous date is no objection to the notice : it need not be dated at all : it only becomes operative as a notice from the time of service. Besides, the objection comes too late : the declaration and notice were served on the 7th November ; and this motion was not made until the 15th ; judgment having been signed on the 12th.

Humfrey, in support of his rule.—There was nothing to warrant a declaration in August : and therefore we had a right to treat the notice to plead as a nullity, until another step taken by the plaintiff in the cause showed that he intended to abide by it.

TINDAL, C. J.—I am not aware of any necessity for a date to the notice to plead : it only operates from the time of service ; and the defendant knows when he is served.

The rest of the Court concurring—

Rule discharged.

WILKS v. DODD.—p. 769.

It seems, that, since the new rules, (Hilary, 4 Will. 4, s. 15,) the plaintiff cannot be ruled to enter the issue.

HELLINGS v. YOUNG—p. 770.

A rule nisi having been granted to reduce the damages, the Court allowed the plaintiff to enter up judgment, and issue execution for that part of the damages which was unobjected to, on his electing to forego the rest.

THIS was an action of assumpsit on an agreement relative to the sale of shares in the Great Western Railway. At the trial, before ALDERSON, B., at the last Summer Assizes at Bristol, a verdict was found for the plaintiff, with 1272*l.* damages ; leave being reserved to the defendant to reduce the damages by a sum of 115*l.* A rule nisi having been granted accordingly—

Bompas, Serjeant, on a former day, obtained a rule on the part of the plaintiff, calling on the defendant to show cause why execution should not issue forthwith for the residue of the damages, leaving the 115*l.* to be the subject of future discussion.

Crowder showed cause.—There is no pretence for the motion. No judgment is yet entered up: and therefore no execution can issue. The plaintiff cannot have two judgments and two executions.

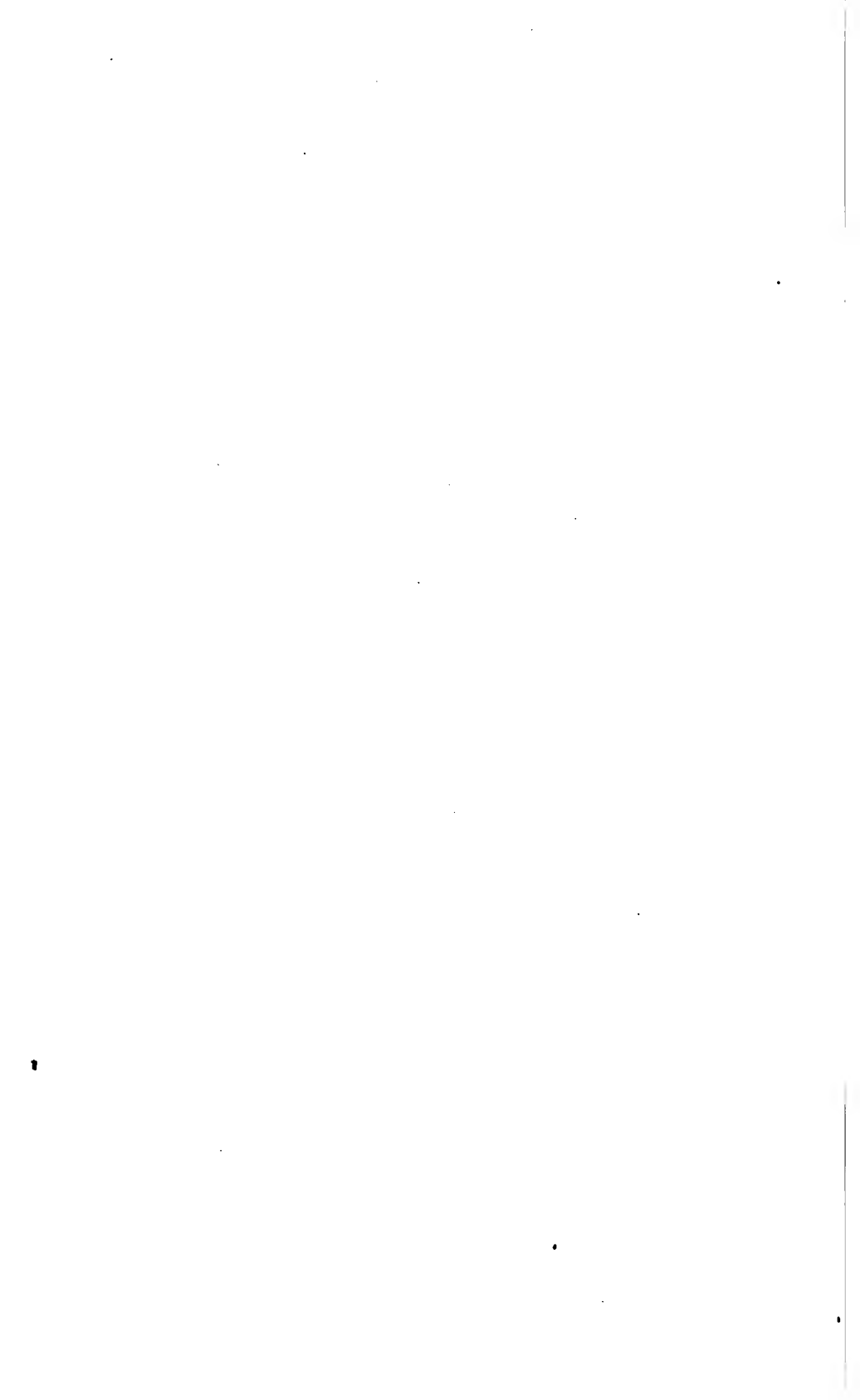
Bompas, Serjeant, in support of his rule.—The Court can, at all events, so mould the original rule as to do justice between the parties.

TINDAL, C. J.—That which the plaintiff asks us to do is pregnant with difficulty. Perhaps, if we had been asked at the time the former rule was moved for, we should have refused to grant it unless the defendant had consented to pay to the plaintiff the balance as to which the objection did not apply. The rule must, however, be discharged; or, if the plaintiff will consent to give up the 115*l.*, the subject of the motion to reduce, that rule may be made absolute.

VAUGHAN, J.—It is impossible for the Court to entertain this rule: its object is, to have execution, without any judgment to warrant it.

The rest of the Court concurring—

Rule accordingly.



REPORTS OF CASES
ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS,
AND
Exchequer Chamber.

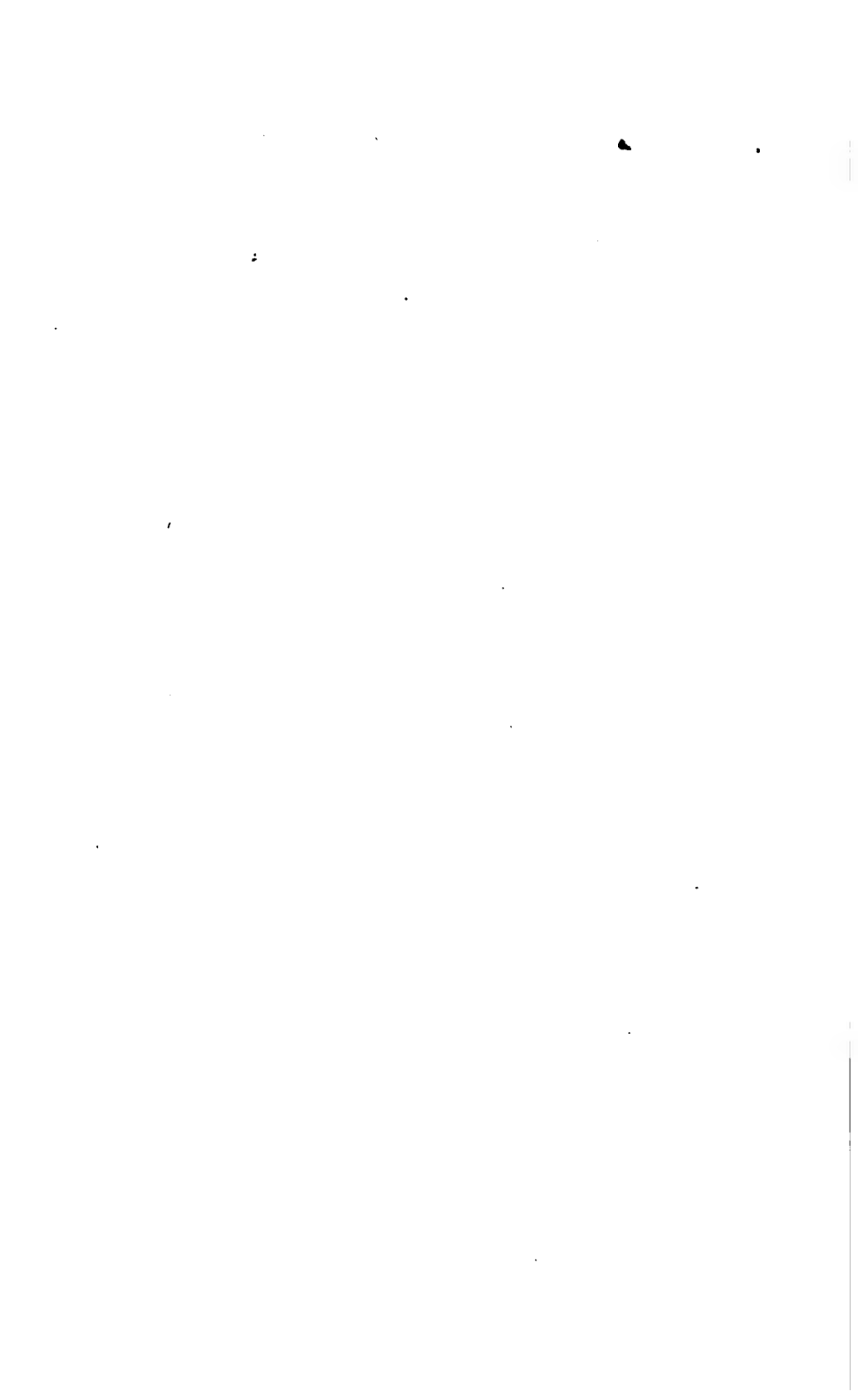
By JOHN SCOTT, OF THE INNER TEMPLE, Esq.,
BARRISTER AT LAW.

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1837.

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CASES
 ARGUED AND DETERMINED
 IN THE
COURT OF COMMON PLEAS,
 IN
Hilary Term,
 IN THE
 Seventh Year of the Reign of William IV.—1837.

The Judges who sat in Banc during this Term were,
 TINDAL, C. J. PARK, J.,
 VAUGHAN, J., BOSANQUET, J.

BRETILLLOT v. SANDOS.—p. 201.

The Court refused to discharge a foreigner out of custody, on the ground that the debt for which he had been arrested was the balance of a demand upon which the plaintiff had received a dividend under proceedings in the country where the debt was contracted, similar to our proceedings in bankruptcy; though it was sworn by a competent person that the law of the foreign country did not warrant an arrest of the person under such circumstances.

THE defendant was formerly a trader in France, where he became bankrupt. Proceedings similar to our proceedings in bankruptcy took place, and his estate was seized in the usual course, and a dividend made, of which the plaintiff (who was a creditor of the estate to the amount of 600*l.*) received his share. Both parties subsequently coming to this country, the plaintiff arrested the defendant for the residue of his debt.

Humfrey now moved that the defendant might be discharged out of the custody of the Warden of the Fleet, upon an affidavit detailing these facts; and also an affidavit made by a French advocate, in which it was stated that the person of the bankrupt was by the law of France sacred from arrest, where he had duly conformed. He referred to *Phillips v. Allen*, 2 M. & R. 576, (15 E. C. L. R. 269; *De la Vega v. Vianna*, 1 B. & Ad. 284, (20 E. C. L. R. 387,) and the cases there cited, for the purpose of showing, that, where a debt is contracted between foreigners in a foreign country, and the remedy for its recovery, as against the person of the debtor, is barred by the law of the country where the debt was contracted, the courts of this country will not lend the aid of their process to enforce payment here by coercing the debtor's

person; and to the case of *Naylor v. Eagar*, 2 Y. & J. 90, where it seems to have been considered, that, where under process from the supreme court of New South Wales, (established by the 4 Geo. 4, c. 96,) the goods of a defendant are attached and rendered to the plaintiff in execution, or bail are put in to pay the condemnation money, the defendant cannot be arrested for the same cause of action in this country; and *Huber v. Steiner*, ante, vol. 2, p. 304, (30 E. C. L. R. 348.)

TINDAL, C. J.—The difficulty we feel is, that, in entertaining this motion, we should be trying a very grave question upon affidavit, and so deprive the plaintiff of his right to appeal to the opinion of a jury. That which is urged may, if true, be a very good ground of defence. But we cannot interfere in the summary way suggested.

VAUGHAN, J., concurring—

Humfrey took nothing by his motion.

DAVIS and Others v. JONES.—p. 202.

In an action by five plaintiffs, the Court refused to allow satisfaction to be entered on the judgment-roll, on a warrant of attorney signed by four of them only, although it was sworn that the other plaintiff had gone to settle in America, and that the damages were merely nominal.

Humfrey moved for leave to enter satisfaction on the judgment-roll. There were five plaintiffs: four of them had signed the warrant of attorney; but the fifth, it was sworn, had gone to America to settle, and therefore his signature could not be obtained. The officer had refused to enter satisfaction without an order of the Court. The damages, it appeared, were merely nominal, and the judgment obtained so far back as the year 1832; and it was suggested that the attorney on the record consented.

TINDAL, C. J.—The absent plaintiff may have received no satisfaction. The defendant must endeavour to ascertain whether or not he has any agent in this country who could consent for him; the authority of the attorney ceases when judgment is obtained. A much more hopeless case must be made out to induce the Court to break through a very salutary rule.

Humfrey took nothing by his motion.

NORRIS v. SALOMONSON.—p. 257.

The drawer of a bill being asked if he was aware that the bill had been dishonoured, answered: "Yes: I have had a very civil letter from Mr. G. on the subject; and I will call and arrange it." In an action against the drawer—Held, that the above admission relieved the plaintiff from the necessity of proving a regular notice.

THIS was an action of assumpsit on a bill of exchange, by an indorsee against the drawer. The only evidence of notice of the dishonour of the bill by the acceptor was that of a witness who deposed, that, in reply to an inquiry made by him of the defendant as to whether or not he was aware of the fact of the bill having been dishonoured, said—"Yes: I have had a very civil letter on the subject from Mr.

Gunnell, (an intermediate indorsee,) and I will call and arrange it." It was submitted on the part of the defendant, that this was not sufficient evidence of a legal and formal notice of the dishonour of the bill, to charge the drawer. *Arabin*, Serjeant, before whom the cause was tried at the Sheriff's court in London, over-ruled the objection; and the jury returned a verdict for the plaintiff.

Gaselee now moved for a new trial, on the ground of misdirection; relying upon the rule laid down in *Hartley v. Case*, 6 D. & R. 505, 4 B. & C. 339, 1 C. & P. 555, (10 E. C. L. R. 350;) and *Solarte v. Palmer*, 5 M. & P. 475, 7 Bing. 530, S. C., in error, 1 Scott, 1, (20 E. C. L. R. 226.)

TINDAL, C. J.—*Hartley v. Case* and *Solarte v. Palmer* are clearly distinguishable from the present case: there the objection was to the form of the notice. Here, however, the effect of the notice is taken from the defendant himself. The case, therefore, seems to me to fall within those where a regular notice has been waived, or the proof of it at the trial dispensed with by reason of the drawer's own conduct. (a) The defendant admitted that he had received a notice of dishonour. The question having gone to the jury, I think we ought not to disturb their verdict.

The rest of the Court concurring—

Rule refused. (b)

(a) See *Anson v. Bailey*, Bull. N. P. 276; *Blesard v. Hirst*, 5 Burr. 2670; *Hopes v. Alder*, 6 East, 16; *Lundie v. Robertson*, 6 East, 231; *Taylor v. Jones*, 2 Camp. 105; *Gibbon v. Coggan*, 2 Camp. 188; *Phipson v. Kneller*, 4 Camp. 285, 1 Stark, 116; *Brett v. Levett*, 13 East, 213, 1 Rose, 102; *Horford v. Wilson*, 1 Taunt. 12; *Margetson v. Aitken*, 3 C. & P. 338, (14 E. C. L. R. 336;) *Wilkins v. Jadis*, 2 B. & Ad. 188, (22 E. C. L. R. 57,) 1 M. & Rob. 41.

(b) See *Boulton v. Welsh*, post, Easter Term, 7 Will. 4, 3 New Cases, 688, (32 E. C. L. R. 283.)

SHERMAN v. TINSLEY.—p. 286.

Where a cause (which has been made a remanet) is tried before the sheriff on a day subsequent to the return day of the writ of trial, the Court will amend the writ.

MORRIS v. THOMPSON.—p. 295.

A rule to compute was refused in an action of covenant for non-payment of rent and land-tax.
Sed quære.

The MAYOR of BATH v. PINCH.—p. 299.

To warrant a motion for an attachment against a party for non-performance of an award, the order of Nisi Prius or the submission must appear to have been previously made a rule of court.

CASE by the Mayor, &c., of Bath against the defendant, a brewer in that city, for unlawfully boring for water upon his own premises so to divert the water from the wells belonging to the corporation. By an

order of *Nisi Prius* the cause and all matters in difference between the parties were referred to arbitration. The arbitrator directed that certain works should be done by the plaintiffs on the defendant's premises but the defendant refused to permit their work-people to enter for the purpose of carrying the award into effect.

Bompas, on a former day, obtained a rule nisi for an attachment against the defendant.

Crowder showed cause. The motion is premature. It does not appear that the order of *Nisi Prius* has been made a rule of court; and therefore the defendant cannot be in contempt.

Bompas, Serjeant, admitted that the order of *Nisi Prius* had not been made a rule of court; but he contended, that, as it appeared from the affidavits, and from the order of *Nisi Prius*, that all the acts to be done under the award were to be completed before the succeeding term, and consequently before the order *could* be made a rule of court, and the rule of court when obtained having relation back to the date of the order, the parties must be taken to have dispensed with a strict and literal compliance with the practice of the court.

TINDAL, C. J.—I think the rule must be discharged. The argument urged on the part of the plaintiffs is not destitute of weight: but, how are we to say that the defendant, if served with the rule of court, might not have come to set it aside? A party clearly cannot be held to be in contempt until he has been made acquainted with the rule of court for the disobedience of which it is sought to put him in contempt.

PARK, J.—When called upon to issue against a party process of a criminal nature, (a) we ought to see that the practice of the court has been strictly pursued.

VAUGHAN, J.—The ground of the motion for an attachment is, not the mere non-performance of the award, but the disobedience of a rule of court. In order to bring the defendant into contempt, personal service of the rule was essential. (b)

Rule discharged, with costs.

(a) See *Rex v. Myers*, 1 T. R. 266; *Rex v. Curwen*, 1 Moore, 494, (4 E. C. L. R. 18.)

(b) *Personal knowledge* of an award and rule of court makes the party liable to an attachment for non-performance of the award, although he has not been *personally served* with the award and rule. *In re Bower*, 1 B. & C. 264, (8 E. C. L. R. 73.)

LUCAS v. GOODWIN.—p. 300.

An affidavit to hold to bail stated that the defendant was indebted to the deponent in a certain sum "for materials found and provided, goods sold and delivered, and work and labour done and performed by the deponent to and for the use and benefit of the defendant, and at his request:—"Held, sufficient.

THE defendant was held to bail upon an affidavit which stated that he was indebted to the deponent in 240*l.* 10*s.* "for materials found and provided, goods sold and delivered, and work and labour done and performed by this deponent to and for the use and benefit of the defendant, and at his request."

Wilde, Serjeant, moved that he might be discharged out of custody, on entering a common appearance. He submitted that the above affi-

davit was insufficient, inasmuch as it did not unequivocally allege the materials to have been found and provided, and the goods to have been sold and delivered "to and for the use and benefit of the defendant," these latter words, by grammatical construction, applying only to the limb of the sentence with which they were placed in juxta-position.

PER CURIAM.—By the natural construction of the language used, the words "to and for the use and benefit of the defendant, and at his request," must be taken to over-ride the whole sentence.

Rule refused.

DOE d. PHILLIPS v. ROE.—p. 359.

In ejectment the declaration was by mistake intituled as of Michaelmas Term, 8 Will. 4, instead of 7 Will. 4. The notice was properly dated:—Held, sufficient.

WOODROFFE v. WOOTTON and Another.—p. 364.

Costs of proceedings in bankruptcy cannot be set off against damages and costs recovered in an action in this court.

DOE d. CARR and Others v. MARY JORDAN.—p. 370.

Where in ejectment the consent rule has been made the means of committing a fraud upon the Court, a party being thereby admitted as defendant who is a pauper and has no real interest in the premises, the Court will interpose.

A motion for this purpose may be made, notwithstanding the proceedings have been stayed by a judge's order until delivery by the lessors of the plaintiff of a particular of the breaches of covenant for which the action is brought.

THIS was an action of ejectment brought to recover the possession of certain premises, a right of re-entry to which was alleged to have accrued to the lessors of the plaintiff by reason of a forfeiture for non-repair pursuant to covenants in an indenture of lease.

Wilde, Serjeant, on a former day, obtained a rule calling upon one Flight to show cause why he should not be made a party to the consent rule entered into by Mary Jordan, or why, in default thereof, the lessors of the plaintiff should not be at liberty to issue execution against the casual ejector, or why Mary Jordan should not give security for costs. —The motion was founded upon affidavits which stated, that, by indenture of lease, dated the 7th June, 1822, the premises in question were demised by the lessors of the plaintiff to one Palmer for twenty-one years; that, after the death of Palmer, his administratrix caused his interest in the residue of the term to be put up for sale by auction; that the deponent (the attorney for the lessors of the plaintiff) was informed and believed that one Thodey attended the sale, and purchased the lease for 80*l.*, in the name of Mary Jordan, and that Thodey was at the time clerk to Flight, and Mary Jordan a pauper, and that Thodey in fact purchased the lease as the agent and with the money of Flight, and for his benefit, and not, as pretended, for Mary Jordan, and that Mary Jordan was put forward to prevent the liability of Flight upon the cove

nants contained in the lease; that application had been made by the deponent to Flight's attorney for the address of Mary Jordan, but that gentleman refused to give her address or any information whatever concerning her; that, in consequence of such refusal, the deponent took out a summons calling upon Flight's attorney to show cause why he should not deliver in writing the defendant's address; that, upon attending one of the judges, his lordship declined to interfere or make any order between the parties; that the deponent had on several occasions made particular inquiries of several of the tenants in possession of part of the premises relative to any knowledge they might have of Mary Jordan, and deponent had been thereupon informed that the rents had been invariably collected by persons who represented themselves to be the clerks or agents of Flight, and that they (the tenants) had on several occasions made inquiries at the time of paying their rents who Mary Jordan was, but such clerks or agents were unable or declined to inform them who she was, where she lived, or any thing about her; that particularly on the 13th July and 2nd April, 1836, one Cartwright, a clerk of Flight, received rent of one Cordingley, one of the tenants in possession of part of the premises, describing it in the receipts as received "for Thomas Flight;" that the deponent was also informed by Cordingley, that, the lease under which he held the premises from Palmer having expired, he wished to treat for a renewal, and, upon making inquiries of the agents or clerks of Flight, he was referred to Flight's attorney, with whom he treated for a renewal; that Flight's attorney had appeared to this action and entered into the usual consent rule as the attorney for Mary Jordan, but the deponent verily believed that Flight had instructed him to appear and defend the action for his benefit, and had appeared in the name of Mary Jordan for the purpose of preventing the responsibility of Flight for the costs. The clerk to the attorney employed by Palmer's administratrix, also swore, that, after the execution of the assignment to Mary Jordan, the deponent was directed by his employers to call upon her in Green-street, Leicester-square, her address having been so inserted in the assignment by the direction of Flight's attorney, for the purpose of serving her with a notice to pay the rent under the assignment to the lessors of the plaintiff; that he accordingly went to that place, but, notwithstanding the most minute and diligent inquiries, was unable to discover that Mary Jordan had ever resided in or near Green-street, Leicester-square, and deponent verily believed that Flight's attorney well knew the address given to be fictitious: that, being unable to discover Mary Jordan, the deponent applied to Flight's attorney for further information as to her address, when he was informed by that gentleman that he knew nothing of Mary Jordan, that the first time he had ever seen her was at the office of his (the deponent's) employers, executing the assignment, and that the notice to pay the rent to the superior landlords had better be given to Flight; that, upon application being made to Flight for information as to the number of the house in Green Street in which Mary Jordan resided, he refused to give any information, and referred the deponent to his attorney.

Bompas, Serjeant, and *Hoggins*, before showing cause, objected that the motion was irregular, the hands of the lessors of the plaintiff being tied up by an order of Mr. Justice VAUGHAN, directing "that the attorney of the lessors of the plaintiff should deliver to the attorney for the

defendant a particular in writing of the breach or breaches of covenant or covenants complained of; and, in case the breach or breaches complained of should be of a covenant or covenants to repair the premises in question, then a particular of the repairs required; and that, in the meantime, *all proceedings should be stayed;*" which order had not been complied with.

Wilde, Serjeant, and *James*, contra.—A stay of proceedings does not prevent the party from coming to the court to make a collateral application, an application to its discretion, and one that over-rides the order. [*VAUGHAN*, J.—Does not the order tie up the hands of the lessors of the plaintiff?] The object of this motion is, not to discharge the order, which in itself is unexceptionable; nor is it a step in the cause: it is an objection taken to a proceeding anterior to the order.

TINDAL, C. J.—I think this is an excepted case. It is not within the mischief pointed at by the rule. The lessors of the plaintiff are not seeking, in defiance of the judge's order, to take a step in the cause. We must hear the argument on the merits.

The rest of the Court concurring—

Bompus, Serjeant, and *Hoggins*, proceeded to show cause, upon the affidavits of Flight and his attorney; the former of whom deposed, that he had been many years acquainted with Mary Jordan; that he had in his hands a small sum of money belonging to her, on which he allowed her interest, and, having an authority from her for that purpose, he, with a view to increase her income, and as a beneficial investment for her, directed his clerk, Thodey, to bid for the premises for Mary Jordan; that, she becoming the purchaser thereof for 42*l.*, he placed the business in the hands of his attorney for completion on her behalf, and furnished him for that purpose with her then residence in Green-street, Leicester-square; that such address was not fictitious, but that Mary Jordan resided and had resided there for many years; that the assignment was executed to Mary Jordan *bonâ fide*, and not to the deponent; that, although the deponent had always managed the property, yet such management had been for the benefit of Mary Jordan, and not for his own benefit; that Mary Jordan had not made to the deponent any declaration in writing or otherwise that she was merely a trustee of the premises for him, nor was she a trustee of the same for him; that the deponent was a very considerable holder of house property, and kept several collectors and clerks for the purpose of the collection and management of the rents and other business connected therewith; that receipts ready printed, with deponent's name printed thereon—"For Thomas Flight"—intended for his collectors or clerks to sign their names thereunder, were kept ready, and on all occasions used, and that deponent's collector, having collected the said rents, used the receipts of the deponent, but the same were nevertheless collected and received for Mary Jordan as the legal owner and proprietor of the premises. Flight's attorney deposed, that, on the occasion of the purchase of the premises of the administratrix of Palmer, he was employed by Flight to complete the purchase for Mary Jordan; that the contract of sale was signed "Edward Thodey, for Mary Jordan;" that deponent prepared an assignment of the premises to the defendant, and for that purpose obtained from Flight the residence of Mary Jordan, in Green-street, Leicester-square, which description was accordingly inserted in the assignment, and the assign-

ment, after being approved by the solicitors for the vendor, was executed by her and by Mary Jordan; and that the deponent did not know, or had the least reason to suspect, nor did he then believe or suspect that such address was a fictitious address, or not the place in which the defendant then resided.

No instance is to be found of a stranger to the record being called upon by a rule of court to give a particular of the defendant's residence. (a) [TINDAL, C. J.—This is not like calling upon a party in an ordinary case to disclose the place of the defendant's residence. Mary Jordan has been let in under the common consent rule to defend as landlady. We must see that the Court is not imposed on, and that she is a real party.] She is not called upon at all: the rule only calls upon Flight. The fact of the same attorney acting for both those individuals makes no difference. Before applying for leave to issue execution against the casual ejector, the lessors of the plaintiff should have sought to set aside the rule substituting her as defendant instead of the casual ejector.

Wilde, Serjeant, and *James*, in support of the rule. It is sworn, and not denied, that Mary Jordan is a pauper; and the facts detailed in the affidavits upon which the rule was obtained, point irresistibly to the conclusion that the insertion of her name as defendant in the consent rule was a fraud upon the Court. In *Thrustout d. Jones v. Shenton*, 10 B. & C. 110, (21 E. C. L. R. 35,) where three ejectments were brought against a landlord and his two tenants, and the landlord obtained a rule for the consolidation of the three actions, and that the ejectment against one of the tenants (who was a pauper) should abide the event of the ejectment against the other, and that action was tried, and the lessor of the plaintiff obtained judgment and took possession of all the tenements, the Court compelled the landlord to pay the costs of that ejectment. In *Thrustout d. Jones v. Nixon*, several ejectments were brought against several tenants, each holding different premises of the same landlord, and, upon an application to set aside the appearance, plea, &c., in one of the actions, and for leave for the landlord to appear and defend for all the ejectments, it was ordered that the landlord should appear within a fortnight, and defend as landlord in all the ejectments, and that, in default thereof, judgment might be signed against the casual ejector. And in *Doe d. Masters v. Gray*, 10 B. & C. 615, (21 E. C. L. R. 138,) it was held, that, in ejectment, the Court will compel the real defendant to pay the costs, *although he is not a party on the record*. These cases show that the proceedings in an action of ejectment, which is the creature of the Court, may always be so moulded as to do substantial justice. [VAUGHAN, J.—Why does not the rule call upon Mary Jordan?] The sole object of the motion was, to compel Flight, the party really interested, to come forward and take upon himself the responsibility which he

(a) In *Taylor v. Harris*, 4 B. & A. 93, (6 E. C. L. R. 357,) where the defendant in assumpsit having pleaded in abatement that four others were jointly liable with himself, the plaintiff applied to the defendant's attorney to give the places of residence and additions of those persons, which he refused unless the action were discontinued; the Court of King's Bench made a rule absolute for the defendant to deliver such particulars, or, in default thereof, for setting aside the plea. So, in *Newton v. Verbeke*, 1 Younge & Jerv. 257, where several persons unknown to the plaintiff were named in a plea in abatement, the Court of Exchequer ordered the defendant to furnish particulars in writing of the places of residence and additions of the persons named, and held, that, for a non-compliance with such order, they would quash the plea.

seeks to evade by setting up an unknown pauper to defeat the ends of justice.

TINDAL, C. J.—I entertain not the slightest doubt as to the power and authority of the Court to interpose where it is made to appear that the consent rule has been the means of committing a fraud. The question here, however, is, whether, after the answer that has been given by Flight, we can see with sufficient certainty that he is, as is suggested, the party really interested. The gist of the motion is that the purchase and assignment from the administratrix of Palmer, the lessee of the premises, though nominally made for the benefit of Mary Jordan, was in point of fact solely for the benefit of Flight, her name being used for the mere purpose of palming a pauper upon the lessors of the plaintiff. Flight, in his affidavit in answer, swears that the property in question was purchased for Mary Jordan; that the assignment was executed to her *bonâ fide*; and that, although he had always managed the property, yet such management had been for the benefit of Mary Jordan, and not for his own benefit. After this positive and complete answer, I think we should not be warranted in interfering.

PARK, J.—I must confess I am by no means satisfied with Flight's answer to the motion: his affidavit is full of inconsistencies. My suspicions were roused at the outset by the fanciful objection so vehemently urged by his counsel. I think the matter should undergo investigation before one of the prothonotaries.

VAUGHAN, J.—I agree with my Brother PARK that a further investigation of this most suspicious case would be desirable. The rule is somewhat extraordinary in its prayer: it calls upon Flight, a person not before the Court, to show cause why he should not be made a party to the consent rule, or why, in default thereof, the lessors of the plaintiff should not be at liberty to issue execution against the casual ejector; and it also calls upon Flight to show cause why Mary Jordan should not give security for costs. (a) It is admitted that Mary Jordan has never been served with the rule: and yet we are called upon to make it absolute against a party who has had no opportunity of being heard. The case is undoubtedly one of great suspicion. Flight makes an affidavit without a single date or circumstance of explanation. Still, he has positively sworn (and he is the last swearer) to facts which I feel oblige me to say that this rule cannot be made absolute. But I think he ought not to have costs.

Rule discharged, without costs.

(a) Where the *lessor of the plaintiff* is unknown to the defendant, the latter may call for an account of his residence, or place of abode from the plaintiff's attorney; and, if he refuse to give it, or give in a fictitious account of a person who cannot be found, the courts will stay the proceedings until security be given for the payment of costs. But the poverty of the lessor of the plaintiff, a known individual, is no ground for an application for security. There is no case to be found in the books, where security for costs has been required to be given by a defendant either in ejectment or in any other form of action.

CASES
 ARGUED AND DETERMINED
 IN THE
COURT OF COMMON PLEAS,
 IN
Easter Term,
 IN THE
 Seventh Year of the Reign of William IV.—1837.

The Judges who sat in Banc during this Term were,
 TINDAL, C. J. BOSANQUET, J.
 PARK, J. COLTMAN, J.

JAULERRY and Others v. BRITTON.—p. 380.

In trover for goods, the defendant was allowed to plead—first, not guilty,—secondly, that the plaintiffs were not lawfully possessed of the goods—and two other pleas alleging a deposit of the goods in question in the hands of the defendant as a security for a bill discounted by a third person.

TROVER against a wharfinger, for goods. Pleas—first, not guilty—secondly, that the plaintiffs were not lawfully possessed of the goods—and two pleas alleging a deposit of the goods in question in the hands of the defendant as security for a bill discounted by a third person. GURNEY, B., struck out the two last mentioned pleas, on the ground that the defence thereby set up was covered by the first and second pleas.

Hoggins now moved that the third and fourth pleas might be restored.

W. H. Watson showed cause in the first instance.—A lien may be given in evidence under not guilty; for, if the defendant has a right of lien, he cannot have been guilty of a wrongful conversion. [TINDAL, C. J.—Why should we drive the defendant to rely upon a doubtful point?] The third and fourth pleas do not in fact set up a lien for a debt due to the defendant; but they attempt to set up as a bar to the action a right to hold the goods as a security for a debt alleged to be due to a third person: they are clearly no answer to the action. [*Per Curiam*.—The question is not whether the pleas are good or bad.] They are not, as it is assumed, pleas under the factors' act, 6 Geo. 4

TINDAL, C. J.—It would be too much, on a motion like this, to enter into a nice discussion upon the factors' act. If the pleas are bad, the plaintiff will, if so advised, demur to them. On payment of costs, I think the rule must be made absolute.

VAUGHAN, J.—It is enough to say that this is not a palpable evasion of the new rules.

The rest of the Court concurring—

Rule absolute.

CLARKE v. VESTRIS.—p. 391.

The Court permitted bail to justify after being disallowed at chambers for not being prepared to give an account of his debts and credits.

The defendant was arrested on the 28th March, and gave a bail-bond on the 4th April. The plaintiff declared *de bene esse* and took an assignment of the bail-bond, and the defendant afterwards, on the 17th April, (having given an undertaking to allow the plaintiff to go on with the original action notwithstanding the proceedings on the bail-bond) pleaded, and bail above justified on the 19th:—The Court stayed the proceedings on the bail-bond, without allowing it to stand as a security, there being time for the plaintiff to go to trial at the last sitting in term, the defendant taking short notice.

Busby opposed the justification of one of the bail in this case, on the ground that he had already been rejected by **COLERIDGE, J.**, at chambers.

It appearing, however, from the statement of the individual himself, verified by the filacer, that he was not *rejected*, but simply disallowed because he was unable at the moment to state correctly the amount of debts owing to and from him; and the bail now stating that he had since examined his books, and his answers being sufficient, the Court allowed him to justify.

Bail justified.

Henderson, for the bail, afterwards obtained a rule nisi to stay the proceedings on the bail-bond. The affidavit upon which he moved stated that the parties had agreed that the proceedings on the bail-bond should not operate a suspension of the proceedings in the original action, and that the defendant had on the 17th pleaded non assumpsit as to part of the plaintiff's demand, and a set-off to the residue.

Busby showed cause, on affidavits whence it appeared that the arrest took place on the 28th March, that a bail-bond was given on the 4th April, and that bail above justified on the 19th.—He submitted, that, had the bail justified in due course, the plaintiff might have declared on the 4th, demanded a plea on the 5th, the time for pleading would have expired on the 9th, and on the 10th notice of trial might have been given, in ample time for the first sitting, the 21st; and therefore a trial had clearly been lost, and the plaintiff was entitled, under the rule of Hilary Term, 2 Will 4, s. 5, (a) to have the bail-bond to stand as a se-

(a) By which it is provided, "that, upon staying proceedings, either upon an attachment against the sheriff for not bringing in the body, or upon the bail-bond, on perfecting bail above, the bail-bond shall stand as a security, if the plaintiff shall have declared *de bene esse*, and shall have been prevented, for want of special bail being perfected in due time, from entering his cause for trial, in a town cause, in the term next after that in which the writ is returnable, and, in a country cause, at the ensuing Assizes." This rule was framed by Mr. Baron Bayley.

To entitle the plaintiff, under this rule, to have the bail-bond to stand as a security, it must appear that a trial was lost at the time of moving for the rule—*Stride v. Hill*, 4 Dowl. 709.

curity. [TINDAL, C. J.—You are yet in time to go to trial at the next sitting, the 28th, and therefore cannot be said to have lost a trial; (a) for, the other side coming to ask a favour, we will impose upon them the terms of taking short notice of trial for that day.] The object of the new rules was, to introduce an uniformity and certainty in the practice of the several courts. The rule upon which the question here turns will be a dead letter, if parties may avoid it by undertaking that the plaintiff shall proceed in the original action pending the proceedings against the bail.

TINDAL, C. J.—To entitle the plaintiff to have the bail-bond to stand as a security, we must see that he has actually been prevented, “for want of special bail being perfected in due time, from entering his cause for trial, in a town cause, in the term next after that in which the writ is returnable, and, in a country cause, at the ensuing Assizes.” Here, the defendant was completely in court on the 19th. Under the particular circumstances of this case, the bail having consented that the plaintiff should go on with the original action, notwithstanding the pendency of the proceedings on the bond, I think the plaintiff cannot be said to have lost a trial, within the terms of the rule. I think the rule must be made absolute on payment of costs, the defendant agreeing to take short notice of trial for the last sitting in the term.

The rest of the Court concurring—

Rule accordingly. (b)

(a) It lies on the plaintiff to show that he has lost a trial—*Rex v. The Sheriff of Middlesex*, 3 Dowl. 194.

(b) Whenever it appears, on the discussion of a motion to set aside a regular bail-bond or attachment, that the plaintiff has been prevented from trying his cause by the irregularity of the defendant's proceedings, he is entitled to have the bail-bond or attachment stand as a security, although it appear that the rule to set it aside might have been disposed of in time to allow the plaintiff to enter and try his cause at the regular time—*Casley v. Binns*, 2 Meeson & Welsby, 285. But see *Rex v. The Sheriff of Shropshire*, in *Chappell v. Bowdler*, 5 Dowl. 256, where it was held that a plaintiff is not considered as having lost a trial in a town cause, if he could have proceeded to trial at any time in the term next after the return of the writ: and therefore, where a plaintiff might have proceeded to trial at the *third* sitting, though he could not at the *first*, he is not entitled to have the attachment stand as a security.

In re BATES.—p. 396.

It is not absolutely necessary that affidavits used on motions under the 3 & 4 Will. 4, c. 74, s. 91, should be intituled “In the Common Pleas.”

In re RICE.—p. 416.

A charge in an attorney's bill, for searching for an old judgment, and advising as to its revival, does not constitute an item taxable within the statute, 2 Geo. 2, c. 23, s. 23;

RUSSELL v. YORKE.—p. 422.

Two actions of trespass and all matters in difference between the parties touching a disputed right of way, were referred to arbitration. The arbitrator by his award directed that the defendant should give an undertaking to discontinue the user of the way in question. On a motion for an attachment for non-performance of the award, the order of *Nisi Prius* having been made a rule of court, the defendant swore that he had not himself used the way, nor had it been used by any of his servants with his consent or knowledge :—The Court refused to grant the attachment.

THE plaintiff and defendant, gentlemen of fortune possessing adjoining estates in Northamptonshire, differed as to whether or not a certain public pathway had been stopped up under an inclosure act, and a verdict had been found for the plaintiff in an action of trespass brought by him against the defendant for using the way. The defendant obtained a rule nisi for a new trial; pending which a second action was brought for other alleged trespasses. Ultimately, the two causes and all matters in difference between the parties were referred to an arbitrator, who by his award directed, amongst other things, that the defendant should undertake not again to use the way in question. The order of *Nisi Prius* was afterwards made a rule of court, and the defendant was duly served with the award, and gave the required undertaking.

Adams, Serjeant, on a former day in this term, upon affidavits alleging various acts of trespass over the locus in quo by the defendant's domestic and other servants, obtained a rule nisi for an attachment against the defendant for disobedience of the rule of court.

Wilde, Serjeant, now showed cause.—He produced an affidavit made by the defendant himself, in which he swore, that the acts of user of the way in question alleged in the affidavits upon which the motion was founded, were committed without his consent or knowledge; that he had never since the date of the undertaking used the way himself; nor did he ever order or authorize any of his servants or labourers to use it: and also an affidavit to the same effect sworn by the parties by whom the alleged trespasses were committed, and who were with one exception, farm servants of the defendant. The learned Serjeant submitted, that the defendant had been guilty of no such wilful breach of his undertaking as to render him liable to be proceeded against criminally for a contempt of the rule of court; and that all that the undertaking meant, was, that the defendant should not himself use the way, or permit it to be used by any of his servants in the course of his service.

Adams, Serjeant, in support of his rule, contended, that, unless the undertaking meant that the defendant should not only himself abstain from using the way in question, but also prevent his servants and dependents from doing so, it would be altogether nugatory.

TINDAL, C. J.—The sole question is, whether or not the defendant has kept good faith with the plaintiff. The affidavits produced in answer to the rule satisfy me that he has done so. He swears that the trespasses complained of were committed by his servants without his consent or knowledge; that he has never since the date of the undertaking used the way himself, nor did he ever order or authorize any of his servants or labourers to use it. The instances of user relied on by the plaintiff are all, with one exception, by day labourers, who cannot be considered quite so much under the control of their employers as domestic servants might be.

* **PARK, J.**—This is an application of a criminal nature. There is not the slightest colour or pretence for it. The case might have been different, had it appeared that the plaintiff had seen his servants using the way in question, without interfering to prevent it.

BOSANQUET, J. There is not the slightest pretence for imputing bad faith to the defendant.

COLTMAN, J., concurring—

Rule discharged.

GREEN v. COBDEN.—p. 486.

The Court will not deprive the plaintiff of the fruits of a judgment obtained by him on a special case argued and determined after the death of the defendant, though four terms have elapsed between the time of his obtaining and of his entering up judgment, unless it be shown that the defendant's estate had suffered prejudice by the delay.

THIS was an action of replevin tried at the Summer Assizes for Sussex in the year 1834, in which a verdict was found for the plaintiff, subject to the opinion of the Court upon a special case. The special case came on to be argued in Hilary Term, 1836, when the Court pronounced judgment for the plaintiff. In Easter Term following a rule nisi was obtained on the part of the avowant, to enter the verdict for the plaintiff on the first and fourth issues, and for the avowant on the second, third, fifth, and sixth issues; and to enter judgment for the avowant non obstante veredicto. This rule was in Trinity Term discharged. The plaintiff (the avowant having died in the month of August, 1835, which was after the special case had been set down for argument, but before it was argued) then applied for leave to enter up judgment nunc pro tunc, as of the term in which it would have been entered up but for the delay necessarily consequent upon the special case. No rule for this purpose was granted, the Court observing that the plaintiff was entitled to enter up the judgment without it. No attempt was made to enter up judgment until the last vacation; when the prothonotary declined to tax the plaintiff his costs, on the ground that they ought to be taxed and final judgment entered up within two terms after judgment had been pronounced by the Court.

W. H. Watson, on the part of the plaintiff, on a former day in the term, obtained a rule calling on the avowant to show cause why the prothonotary should not be directed to tax the plaintiff his costs, and to sign final judgment for him.

Talbot now showed cause.—This case does not fall within the statute 17 Car. 2, c. 8, s. 1, which limits the time for moving to enter up judgment to two terms after the verdict. [*TINDAL, C. J.*—The delay was rather the act of the Court, which is never allowed to prejudice the parties.] Undoubtedly, where a party is entitled to judgment, and the decision is delayed by the act of the Court, the circumstance of the death of one is not permitted to enure to the prejudice of the other—*Bridges v. Smith*, 1 M. & Scott, 93, 8 Bing. 29; *Key v. Goodwin*, 1 M. & Scott, 620, (21 E. C. L. R. 209.) But that rule only applies where the delay has arisen solely from the act of the Court, and not where the party's own laches have conduced to it. In *Lawrence v. Hodgson*, 1 Younge & J. 368, it was expressly held, that, if the plain-

tiff die after verdict for him, and no judgment is entered up within two terms after the verdict, the Court will not interfere and permit it to be entered nunc pro tunc, if any laches be imputable to the party interested in the judgment. GABROW, B., there says: "I perfectly understand the principles upon which the courts have permitted the parties to enter up judgment after the period in which they could legally have done so has elapsed, where the delay originates in the Court, and but for which delay the judgment might have been regularly entered. Where a case stands over for argument from term to term, on account of the multiplicity of business in the court, or for judgment, from the intricacy of the question, the party ought not to be prejudiced by that delay, but should be allowed to enter up his judgment retrospectively, to meet the justice of the case. No such facts, however, exist in this particular instance, and the delay is imputable alone to the laches of the party interested in the judgment: the rule, therefore, which regulates the former cases, does not apply to this; and, as it is not within the operation of the statute, I am of opinion, on the authority of *Copley v. Day*, 4 Taunt. 702, that the rule should be discharged." Here, the parties have been guilty of still greater laches. The avowant died in August, 1835, and no step was taken to cause the judgment to be entered up until Hilary Vacation, 1837.

TINDAL, C. J.—I think this case falls within the general principle laid down or alluded to in the cases cited. It appears that a verdict was taken for the plaintiff; but, the question involved being one of difficulty, the facts were stated in the form of a special case. The hearing of the argument on the special case, from the press of business in the court, stood over for more than two terms: and the avowant died after the verdict, but before the special case, for the reasons before mentioned, could be argued, so as to entitle the plaintiff to judgment. If the plaintiff once had the right to have judgment entered up, I see nothing in the circumstances to authorise us to take it away from him: and I must confess I am not at all embarrassed by the difficulty suggested in *Lawrence v. Hodgson*. The avowant's representatives do not show that his estate is injured by the delay. Had that been so, there might be ground for the Court to interfere.

The rest of the Court concurring—

Rule absolute.

STOCKEN v. WEDDERBURNE.—p. 570.

The 2 Will. 4, c. 39, s. 8, has not altered the mode of charging prisoners in execution.

WHITMORE v. BINNS.—p. 571.

The 2 Will. 4, c. 39, s. 8, has not altered the mode of charging prisoners in execution.

PIGOU v. DRUMMOND.—p. 573

The defendant mortgaged to one J. P. for 3000*l.*, certain *fee-farm* rents. The principal being unpaid, and 450*l.* being due for interest upon the mortgage, a written contract was entered

into between the defendant and J. P. for the sale to the latter of the rents in question for 3,785*l*. Pending the investigation of the defendant's title J. P. died, leaving the plaintiff her executor and residuary legatee. After the draft conveyance had been settled and approved, the defendant being abroad, the plaintiff, without any notice either to the defendant or to his attorney, (though he knew that the defendant was abroad, and that he had an attorney acting for him here,) made affidavit that the defendant was indebted to him as the executor of J. P. in the sum of 3,550*l*. and upwards, for principal and interest, and sued out a *capias*, and caused it to be delivered to the sheriff with directions to return it *non est inventus*, and thereupon caused the defendant to be outlawed.—The Court reversed the outlawry with costs.

By indenture of lease and release of the 25th and 26th of August, 1826, the release being made between John Easthope and Frederick John Ryan, of the first part, the defendant of the second part, A. B. Drummond and John Drummond of the fourth part, and Jemima Pigou the fifth part, in consideration of 3,000*l*. paid by Jemima Pigou to Frederick John Pigou and John Easthope, certain fee-farm rents therein particularly described, and producing the net annual sum of 206*l*. or thereabouts, were conveyed unto and to the use of the said Jemima Pigou, her heirs and assigns, for ever, subject to redemption on payment by the defendant of the sum of 3,000*l*. and interest at 5 per cent. per annum, at the terms and in the manner herein mentioned; and in the indenture of release or mortgage was contained a covenant on the part of the defendant for payment of the said sum of 3,000*l*. and interest at the time and in manner therein mentioned. The said sum of 3,000*l*. and interest was not, nor was any part thereof paid according to the proviso and covenant in the indenture of mortgage; and in November, 1829, there was due and owing to Jemima Pigou the sum of 3,450*l*. for principal and interest on the mortgage. About that time, a treaty took place between the defendant's solicitor and the solicitor of Jemima Pigou for the absolute sale by the defendant of these fee-farm rents to Jemima Pigou, which terminated in a written contract between them for their sale to Mrs. Pigou for the sum of 3,785*l*., out of which 3,450*l* so due for principal and interest as aforesaid were to be deducted and retained by Mrs. Pigou. Whilst the investigation of the title of the defendant to the said fee-farm rents was proceeding, that is, in or about the month of July, 1832, Mrs. Pigou died, having first made and published her last will, and thereby appointed the plaintiff, R. R. Pigou, the executor and residuary legatee. In January, 1834, the plaintiff received from Samuel Harding, the defendant's receiver, the sum of 500*l*., and of the arrears of the fee-farm rents which had been got in and collected by the receiver on account of the defendant. Notwithstanding the contract for the purchase of the fee-farm rents had never been abandoned by the plaintiff, but, on the contrary, the draft of a conveyance having been sent by his solicitor to the defendant's solicitor for his perusal and approval, which draft was settled, approved, and returned by the latter to the plaintiff's attorney, yet the plaintiff, without any notice whatever, either to the defendant or to his attorney, on the 17th May, 1834, made an affidavit of debt, whereby he deposed that the defendant was indebted to him, as executor of Jemima Pigou, in the sum of 3,550*l*. and upwards for principal and interest due from him upon his covenant in that behalf contained in the before-mentioned indenture of release or mortgage; and, on the 17th of May, issued a writ of *capias* against the defendant, directed to the sheriff of Middlesex, and indorsed for bail for 3,550*l*. and upwards, by affidavit, and also indorsed—"capias to outlawry, to be returned *non est inventus*." On the 2d June, 1834, the

sheriff accordingly returned non est inventus. At the time the plaintiff made the above affidavit, and at the time of the writ of capias, the defendant was, and had then for two years and upwards been residing near Brussels, his attorney having been during all that period in the habit of writing to and receiving letters from him from that place. At the time of the issuing of the writ of capias, it was well known to the plaintiff's attorney that the defendant was beyond the seas, he having, on the 24th May, given the defendant's attorney notice of an intended application to the court for security for costs in a case of *Drummond v. Pigou*, on the ground of the plaintiff's (the defendant in this cause) absence from England. On the 27th, such rule was obtained, and afterwards made absolute. On the 31st October, the plaintiff also obtained an order of the Master of the Rolls, requiring the defendant to give security for costs in the suit there.

The defendant's attorney having discovered the fact of the proceedings to outlawry, on the 24th October filed a bill in Chancery against the plaintiff, praying for a specific performance of the contract, and for an injunction to restrain the plaintiff from further prosecuting his outlawry, and all further proceedings at law in this or any other action against the defendant; whereupon an order was made by the Master of the Rolls on the 10th November, by which it was ordered (the defendant by his counsel undertaking to give judgment in the action at law commenced against him by the plaintiff, in the sum of 4,000*l.*, to be dealt with as the Court should think fit at the hearing of the cause) that an injunction should be awarded to restrain the plaintiff from taking any further proceedings in the action at law, or from further prosecuting the process to outlawry instituted by him against the defendant, or prosecuting any other action at law against the defendant in respect of the matters in the bill complained of. Upon searching at the proper office of this court, the defendant's attorney found that the defendant had been declared an outlaw upon the process so sued out and prosecuted by the plaintiff in this action. At the hearing of the motion made on the part of the defendant before the Master of the Rolls for an injunction, it was admitted by the plaintiff's counsel that the contract for the purchase of the fee-farm rents was a good and subsisting contract. On the 11th November instant, the defendant's attorney wrote to the plaintiff's attorney, requesting him to consent to a reversal of the outlawry, in order to obviate an application to this court; to which the plaintiff's attorney refused to accede, though he admitted that further proceedings thereon had been stayed substantially by the injunction.

Upon an affidavit of these facts; and also stating that, instead of the defendant being indebted to the plaintiff in the sum of 3,550*l.* and upwards, as sworn to by the plaintiff, the latter was in fact indebted, at the time the affidavit was sworn, to the former in the sum of 562*l.* 8*s.* 4*d.*—

Wilde, Serjeant, obtained a rule calling upon the plaintiff to show cause why the outlawry should not be reversed, with costs.

Talfourd, Serjeant, showed cause, contending that there was nothing in the circumstances disclosed by the affidavit upon which the motion was founded to negative the plaintiff's right, or to show that he had not reasonable grounds for proceeding to outlaw the defendant; and therefore, that, if the Court, under the circumstances, thought the out-

lawry ought to be reversed, it could only be upon the usual terms, viz. on payment of costs.

Wilde, Serjeant, was heard in support of his rule.

PER CURIAM:—Under the peculiar circumstances of this case—the pendency of the negotiation between the parties for the purchase and sale of the fee-farm rents, the plaintiff's cognizance of the fact of the defendant's absence, and that he was represented by an attorney in this country, and the unjustifiable and improper course pursued by the plaintiff in procuring the sheriff to return non est inventus to the capias utlagatum—we think the rule for reversing the outlawry at the expense of the plaintiff should be made absolute; the defendant undertaking to enter a common appearance pursuant to the order in equity, to accept a declaration for the mortgage money, and to suffer judgment in this action by nihil dicit for 4,000*l*.

Rule absolute accordingly. (a)

(a) The report of this case, *antè*, vol. i. p. 264, not disclosing the specific facts upon which the motion to reverse outlawry was founded, and the case having repeatedly been cited as an authority to show that the simple fact of the plaintiff's knowledge of the defendant's being abroad and of his being represented by an attorney here, was ground for setting aside the proceedings with costs; it has been deemed advisable to give an amended report of the decision, with a full statement of the facts, and the special form of the rule.

REPORTS OF CASES
ARGUED AND DETERMINED
IN THE
COURT OF KING'S BENCH.

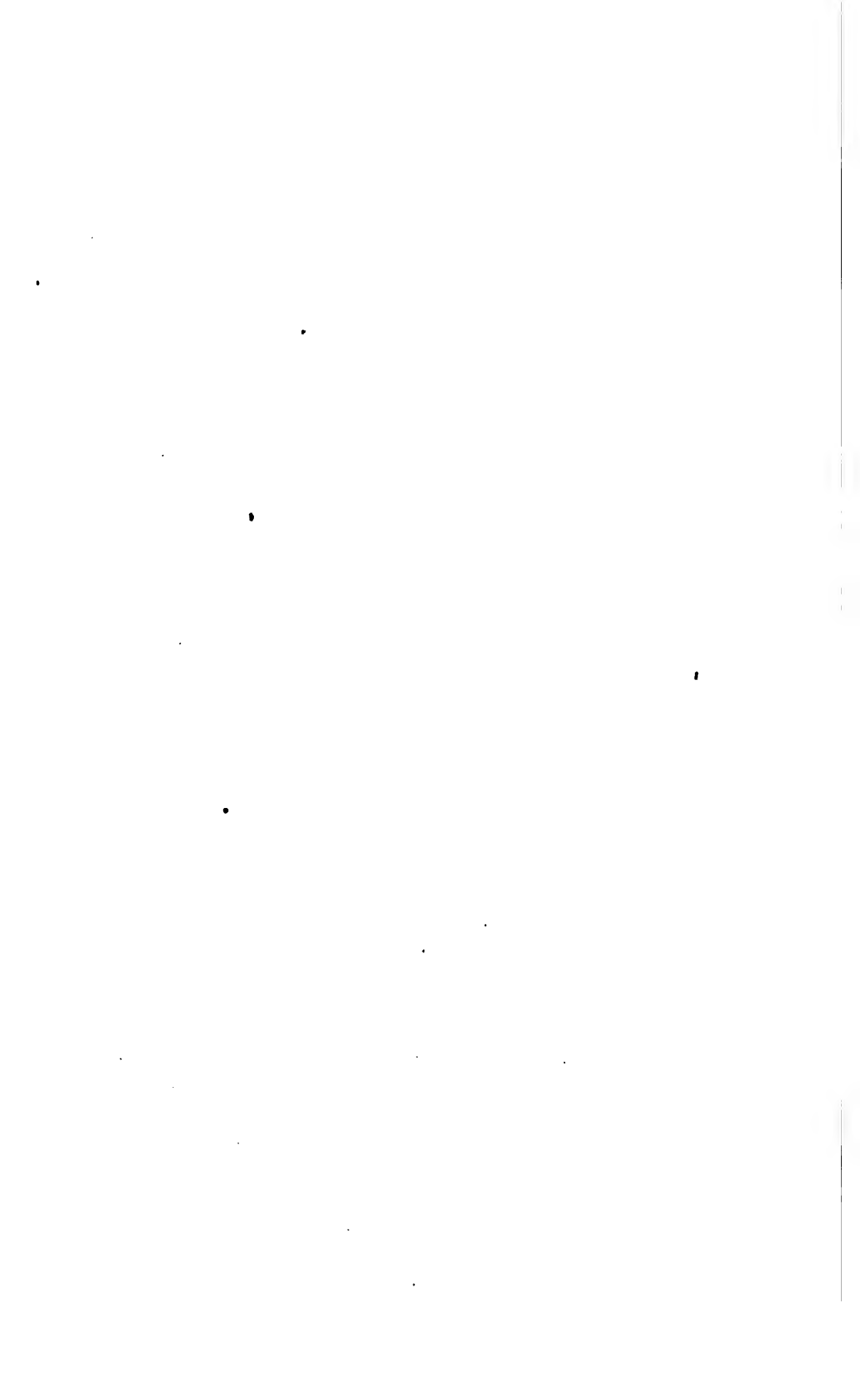
By S. NEVILE, Esq., OF THE INNER TEMPLE,
AND
W. M. MANNING, Esq., OF LINCOLN'S INN,
BARRISTERS AT LAW.

VOL. V.

**CONTAINING CASES IN TRINITY AND MICHAELMAS TERMS, IN THE
FIFTH AND SIXTH YEARS OF WILLIAM IV.**

1835.

PHILADELPHIA:
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1857.



CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

Trinity Term,

IN THE

Fifth Year of the Reign of William IV.—1835.

The KING v. SIVITER.—p. 125.

A charter granted by Queen Eliz. and confirmed by Charles 1, exempting the tenants of certain ancient demesne lands from the payment of road money, (*chimagium*.) does not operate to exempt them from the performance of *statute duty* on the highways, pursuant to 13 Geo. 3, c. 78; 34 Geo. 3, c. 64; 44 Geo. 3, c. 54, and 54 Geo. 3, c. 109.

The KING v. The Justices of SUFFOLK.—p. 139.

Upon the trial of an indictment at the quarter sessions, that Court is the sole judge of the propriety of the entry of the verdict.

Where, therefore, upon a special finding by the jury, amounting to an acquittal, the chairman directs a verdict of guilty to be entered, the Court of K. B. will not grant a mandamus requiring the minute of the verdict to be altered according to the fact.

The only course open to the prisoner is to apply to the crown for a pardon.

ROBERT HEWES was indicted, at the Easter quarter sessions for the county of Suffolk, in 1835, for maliciously poisoning some horses belonging to his master. At the trial it appeared that the prisoner had administered to the horses a root cut into pieces, called *bank-break*, which caused a slow inflammation, of which they died. The defence set up by the prisoner was, that this drug was of a stimulating nature, and was frequently administered to horses to improve their coats, and that he had given the root to the horses for this purpose, and had not acted from a malicious motive. At the conclusion of the case, the prisoner's counsel contended that the prisoner was entitled to an acquittal, as there was no proof that the act was done maliciously, and he cited a passage from 3d Institute. (a) The chairman summed up the evidence, and the jury returned a verdict of "guilty by mischance." This verdict was entered by the clerk of the peace, in the minute book of the pro-

(a) If it be done by mischance or negligence, it is no felony, 3 Inst. 67.

ceedings of the sessions. The counsel for the prisoner submitted that this finding of the jury was a good special verdict, and that the prisoner was upon that finding entitled to an acquittal. The chairman however told the jury that he could not receive this verdict, and that they must find in terms either that the prisoner was guilty or not guilty. The jury again retired, and after a short time returned and found the prisoner guilty, but recommended him to mercy. The chairman asked them upon what grounds they recommended the prisoner to mercy, and they said, "Because we think it was not done with any malicious intention, but to better the condition of the horses." The chairman then directed the clerk of the peace to enter a verdict of guilty, which was done, and the prisoner sentenced.

In Easter term *Byles* obtained a rule, calling upon the justices and clerk of the peace, to show cause why a mandamus should not issue, commanding them to cancel the alteration made by the said clerk of the peace in the minute of the verdict, or to alter the minutes of the verdict so given, according to the fact.

Biggs Andrews, and *Sydney Taylor*, were about to show cause, when they were stopped by the Court.

LITLEDALE, J.—Was any authority shown to the Court when this rule was obtained? In *Rex v. Carlile*, 2 Barn. & Adol. 971, (22 E. C. L. R. 226,) the record was brought into this Court by writ of error.

Byles, in support of the rule. If the record be brought here by writ of error, this Court cannot compel the amendment. But this Court has the power to correct the practice of an inferior court, where it tends to injustice. This Court will interfere by mandamus, where an inferior court, in a matter of practice, whether preliminary, or subsequent to a judicial investigation, violates the law. This power follows from the constitution of this Court. If the Court of Quarter Sessions neglect to enter continuances, this Court will compel them to do so, where the justice of the case requires it. In *Rex v. The Justices of the W. R. of Yorkshire*, antè, ii. 390, 396, (27 E. C. L. R. 151,) the sessions having refused to hear an appeal, this Court granted a mandamus, commanding them to enter continuances and hear the appeal. In that case it was contended that the justices were the proper judges of matters of practice arising at their sessions, and that their decision, unless manifestly wrong, ought not to be interfered with. Lord DENMAN, C. J., says, "I have always understood that this Court will interfere to see that no illegal practice prevails at the Court of Quarter Sessions." The verdict was properly entered, in the first instance, by the clerk of the peace. That is the only mode by which a verdict can be recorded at the time of delivery, as appears from what fell from Lord TENTERDEN, in *Rex v. Carlile*; and the Court of Quarter Sessions had no right to direct the alteration of the minute. [PATTESON, J. You do not furnish us with any instance of the Court interfering after the record has been made up.] There are several cases in which this Court has, on error, refused to amend; *Salter v. Slade*, antè, iii. 717, (28 E. C. L. R. 162;) *France v. Parry*, 1 Adol. & Ellis, 615, (28 E. C. L. R. 165;) *Mellish v. Richardson*, 9 Bingh. 125; 6 Bligh. 70; 2 Moore & Scott, 191, (23 E. C. L. R. 276.) A writ of error is the proper remedy, where the error is judicial and on record; a *mandamus*, where the error is, as in this case, in a proceeding ministerial or extra-judicial; Com. Dig. *Mandamus*, (A.) If this mandamus is refused, the trial by jury in Courts

may almost be dispensed with. If the Court en-
 damus ought to be issued. [PATTESON, J. If
 icted before a court of oyer and terminer, the
 lge. If we were to assume a jurisdiction
 o every court in the kingdom. We
 at bar, before the Court of Common
 eported as *Rex v. Justices of Middlesex*,
 as was to *make up* the record.] In *Rex v.*
re, 10 East, 404, Lord ELLENBOROUGH said,
 ainly had a discretion to exercise with respect to
 e time for giving the notice of appeal, but we have
 atorial jurisdiction over them, in the exercise of such
 ver. In the case of an appeal respecting the settlement
 the Court of Quarter Sessions give judgment for the appel-
 refuse to award the costs of maintenance; a mandamus lies
 el the Court to amend their judgment, by giving to the appel-
 the costs of maintenance;" *St. Mary's, Nottingham v. Kirkling-*
 , 2 Bott. 756. The rule must be the same in criminal cases. Sup-
 pose the jury to return a verdict of "not guilty," and the chairman to
 direct a verdict of "guilty" to be entered,—surely this Court would in-
 terfere. Here, there was a mistake in practice, subsequent to the judi-
 cial proceeding. A jury may, in criminal as well as in civil cases,
 insist on giving a special verdict, and it was formerly their safer course,
 for if they gave a false verdict, they were liable to attain; (*a*) *Dow-*
man's Case, 9 Co. Rep. 12 b; 2 Hale's Pleas of the Crown, 302; 4
 Bla. Com. 360. The finding of the jury in this case was a good special
 verdict. The verdict amounts to an acquittal, for the word "guilty"
 may be rejected as a conclusion of law repugnant to the premises: Ba-
 con's Abr. *Verdict*, E.; *Foster v. Jackson*, Hob. 53; *Priddle v. Napper*,
 11 Co. Rep. 9; indeed it is not necessary to reject the word "guilty,"
 for that may mean guilty of the trespass.

LITTLEDALE, J. (*b*)—I am of opinion that we have no power to
 issue this mandamus. The rule is for a mandamus to cancel the altera-
 tion made by the clerk of the peace, or to alter the minute of the
 verdict according to the fact. It may be admitted that this court has a
 species of superintending jurisdiction over inferior courts, but we must
 see that this jurisdiction has before been exercised in the manner now
 proposed. It is urged that we interfere with the Court of Quarter
 Sessions, and oblige them by mandamus, in certain cases, to enter con-
 tinuances and hear an appeal. In those cases this court merely puts
 the Court of Quarter Sessions *in motion*, and obliges them *to decide*.
 In *Rex v. Bowman*, this Court merely directed the Court of Quarter
 Sessions to *make up* the record; and *that* was done after some
 difficulty. We have no authority to interfere with the practice
 of other courts *in this way*. At the assizes, disputes sometimes
 arise as to the mode of entering the verdict. If we interfere in this
 case, we may as well interfere with the proceedings at the assizes, (*c*)

(*a*) But not if the indicted were found guilty, as then he would have been convicted by 24;
 1 Roll. Abr. 280; nor upon a verdict on an appeal of felony, F. N. B. 107, (L.)

(*b*) Lord Denman, C. J., had left the Court to sit as Speaker of the House of Lords.

(*c*) As the judge of assize acts under the authority of the court out of which the record
 issues, the courts above do exercise control over verdicts found at nisi prius; *secus* as to verdicts
 found before justices of oyer and terminer or of gaol-delivery, who derive their authority solely
 from the crown.

or with the proceedings of any other court in the kingdom. Whether the verdict is entered properly or improperly, is matter for the consideration of the Court in which the trial takes place. The finding of the jury might perhaps amount to something to be returned, but as no instance has been given of an exercise of jurisdiction in a similar case, this rule should, in my opinion, be discharged.

PATTESON, J.—If there had been any *authority* for this course of proceeding, we should have been desirous to proceed to ascertain whether justice has been done in this case. But as no authority has been adduced, we ought not, in my opinion, to interfere. The cases cited, in which this Court has by mandamus compelled the Court of Quarter Sessions to enter continuances and hear an appeal, do not resemble this case. The Court, by *ordering continuances* to be entered, is only supplying a *defect*, and the mandamus in such cases commands the Court of Quarter Sessions *to hear* an appeal. It is necessary that there should be continuances entered, to give the Court of Quarter Sessions *jurisdiction*, and for that purpose they are directed to be entered. So, if it were necessary, as in *Rex v. Bowman*, that a record should be *made up*, this Court would interfere by mandamus, as it did in that case. But I have always understood that this Court would send a mandamus in *general* terms, and would not require the inferior court to do a *specific act* in a *particular* mode. It would be wrong to issue a mandamus merely for the sake of a return. If the jury really did mean that the prisoner should be acquitted, the proper course is to apply to the secretary of state.

WILLIAMS, J.—I see no reason why we should interfere by mandamus. Where the Court of Quarter Sessions altogether decline to hear a matter which is within their jurisdiction, this Court has the power to issue a mandamus to compel them to do so. But we do not direct a mandamus to do a specific act. If parochial officers refuse to make a rate, this Court will, if necessary, compel them to make one, but we do not command them to make an equal rate; 1 Nol. P. L. 62. Were we to interfere in this case, we should be doing that for which no precedent can be adduced. I cannot distinguish this from any other point in practice.

Rule discharged.

MASON v. LEE.—p. 240.

To intitle a plaintiff to a *distringas* upon a writ of summons not personally served, it is not sufficient to show that unsuccessful attempts were made to serve the defendant at his residence on three occasions, and that on the *second* a copy of the writ was left, and referred to on the third.

The copy of the writ must be left on the third visit.

Shee moved for a *distringas* upon a writ of summons, which had not been served personally. A clerk to the plaintiff's attorney had called three times at the defendant's residence, but had been unable to see him. On the occasion of the *second* visit, a copy of the writ was left with the defendant's servant, and at the third visit the copy left on the preceding occasion was referred to, and the object of the visits explained.

Cur. adv. vult

On the following day, Lord DENMAN, C. J., said—We have considered of this matter, and we think that there ought not to be any rule. The copy should be left at the *third* visit.

Rule refused.

In the matter of PARSONS.—p. 241.

The Court will not admit an attorney on the last day of the term, upon a notice of application posted on the third day of that term.

So, although sufficient notice had been posted during the whole of a preceding term.

On the 15th of June, in this term, *Byles* moved that Mr. Parsons might, on the last day of this term, be admitted an attorney of this court. It appeared upon his affidavit, that Mr. Parsons had duly served articles with an attorney; that the usual notice of application for admission had been posted upon the *third* day of this term, and that a similar notice had been posted up during the whole of Trinity term, 1834, but that no application had been made in pursuance of such notice. Mr. Parsons further swore, that he believed that no one had any objection to him, or intended to oppose his application for admission, and that as an advantageous opening for practice existed, it would be very detrimental to his interests, if, by the refusal of this application, he should be thrown over to the last day of next Michaelmas term. *Byles* referred the Court to a case in which, as he had been informed by Mr. Steer, a party had been admitted whose notice had been posted on the *second* day of the term. [PATTESON, J. Next term we shall have a similar application where the notice has been posted on the *fourth* day; after that it will be the *fifth* day, then the *sixth*,—and all will be cases of *hardship*.]

Lord DENMAN, C. J.—Perhaps we have gone too far already. We certainly must go no further.

Rule refused.

DOE d. EDWARDS v. JOHNSON and others.—p. 281.

A is seized of lands in the hamlet of Dale and of lands in the hamlet and chapelry of Sale, both townships being in the parish of Dale;—Whether, by a devise by A. of all his lands in Dale, the lands in Sale necessarily pass, *quære*.

As to the admissibility of certain documentary evidence, to show that Sale has been treated as part of Dale, *quære*.

The register of county electors, in which Dale and Sale are treated as different parishes, is not admissible evidence for the purpose of disconnecting Dale from Sale.

EJECTMENT for lands in Cambridgeshire, tried before VAUGHAN, B., at the Cambridge summer assizes, 1833, when a verdict was entered for the plaintiff, subject to the following case, and also subject to objections by either party as to the admissibility of any of the evidence adduced on the trial.

The lessor of the plaintiff claimed as eldest brother and heir of Wm. Edwards, deceased. The defendants admitted the heirship of the lessor of the plaintiff, and claimed under the will of Wm. Edwards. Wm. Edwards, by his will, in which he is described as W. E. "*of Levering-*

ton, in the Isle of Ely," bequeathed 1400*l.* to the lessor of the plaintiff, and 100*l.* to his son; and after bequeathing several other specific and pecuniary legacies, he devised to John Johnson, "*of Leverington-Parsons-Drove, in the said Isle of Ely,"* and others, (the defendants,) all and singular his messuages, lands, tenements, and hereditaments, of what tenure soever the same may be, situate, lying, and being in *Leverington aforesaid*, and in Wisbech-St. Peter's and Wisbech-St. Mary's, in the said Isle of Ely, or of any of them, habendum to them and their heirs, in trust,—during the minority of his great niece, M. A. Peck,—to set apart out of the rents and profits 50*l.* annually for her education and maintenance, and to apply the residue of the rents and profits towards satisfaction of the legacies and annuities given by the will, and after satisfaction thereof, to apply the residue as part of the residue of the personal estate; and upon further trust, upon the majority of M. A. Peck, to convey the said messuages, &c., in Leverington, Wisbech-St. Peter's, and Wisbech-St. Mary's, to her use for life, remainder to her child or children in fee; but if she should die under age, then upon similar trusts for the benefit of the testator's great nephew, W. A. Peck, and his children. And he devised to the said trustees all his messuages in Newton and Tid-St. Giles, in the said Isle of Ely, upon similar trusts, except that the trusts in favour of W. A. Peck and his children, preceded those in favour of M. A. Peck and her children. And he directed that if his personal estate and the surplus rents of his said real estates should not be sufficient to pay all the legacies in full, then his trustees should retain all the said real estates, after the attainment of the respective majorities of M. A. Peck and W. A. Peck, until by and out of the rents and profits of the same, all the said legacies, &c., should be fully paid. And he directed, that if both M. A. Peck and W. A. Peck should die under age, then his trustees should stand seised of all the said messuages, &c., in Leverington, Wisbech-St. Peters, Wisbech-St. Mary's, Newton, and Tid-St. Giles aforesaid, upon trust to sell the same, and to pay the proceeds to all the testator's nephews and nieces, who should be living at the death of the survivor of them the said M. A. Peck and W. A. Peck. And the testator bequeathed to his trustees all his live and dead stock, implements of husbandry, household furniture, and all other his goods, chattels, and personal estate, upon trust to sell the same, and to pay the proceeds and all ready money, and securities for money which he might have by him at the time of his death, to M. A. Peck, and W. A. Peck, in equal shares, at twenty-one; and if either died before twenty-one, then to the survivor; and if both died before twenty-one, then to the nephews and nieces aforesaid.

In order to prove that the lands sought to be recovered in this action, which were 18½ acres, lying in *Leverington-Parsons-Drove*, passed to them under the devise of all the testator's messuages, &c., in *Leverington*, the defendants, gave the following evidence, almost the whole of which was objected to by the plaintiff's counsel.

Certain letters of composition, concerning the parish church of *Leverington*, with the annexed chapel of *Parsons-Drove*, dated 1397, and produced from the parish church of *Leverington*,—and also an exemplification of the same composition, under the seal of the Bishop of *Ely*, dated 1488,—by which the rector agreed that the inhabitants of *Leverington-Parsons-Drove*, getting their chapel consecrated, might have there the sacraments appertaining to marriages and burials, yet

without prejudice to the parochial church of Leverington, such inhabitants acknowledging themselves to be subject to the mother and parish church of Leverington, in all things as anciently.

Certain articles of agreement, dated 1702, made between the then rector of Leverington and the churchwardens and divers inhabitants thereof, of the one part, and the then curate of the hamlet of Leverington-Parsons-Drove, in the parish of Leverington aforesaid, and divers inhabitants, owners or occupiers of land in Leverington-Parsons-Drove, of the other part, whereby, in order to put an end to suits and controversies then existing between the inhabitants of Leverington-Parsons-Drove, concerning the payment of a church rate by the occupiers of land in Leverington-Parsons-Drove aforesaid, to the churchwardens of Leverington, for the repairs of the parish church there; it was agreed, that in every year for the future, in which a church-rate should be assessed in the said town of Leverington, the inhabitants and others of Leverington-Parsons-Drove aforesaid, should pay to the churchwardens of the said town of Leverington 10s., and that the same should be accepted in full satisfaction and discharge of all rates and assessments upon the inhabitants, owners and occupiers of lands of and in the said hamlet of Leverington-Parsons-Drove, for and towards the repairs of the parish church of Leverington.

A series of collations to "the rectory of Leverington with the chapel of Parsons-Drove."

An act of 15 Car. 2, for settling the draining of the Bedford Level;—and several allotments of land in Leverington-Parsons-Drove made under that act to and in respect of messuages in Leverington.

Title deeds, beginning in 1728, to the lands in question, which were formerly part of an estate of 64 acres, in which these lands were described as "lying in Leverington, in a certain place there called Paston-Drove, and Paston-Drove Fen, within the said parish of Leverington."

A witness proved that the lands, which lie west of a bank in Leverington, called Overdike Bank, are in what is called Leverington-Parsons-Drove, and that those lands paid tithe to the rector of Leverington, and that the annual sum of 10s. mentioned in the agreement of 1702, continues to be paid down to the present time, in lieu of the church-rate; that there are commons, droves, and wastes, partly in Leverington and partly in Leverington-Parsons-Drove, which are open equally to the inhabitants living in either part of the parish, and that the inhabitants of the two places intercommon; that the land in question lies on the west side of the bank, and had for many years been in the possession of the testator, who also possessed 60 acres on the east side of the bank, and lived at Leverington; that there are separate overseers for the two places, separate poor-rates, and separate highway-rates; that there is a land-tax assessment for Leverington, and another for Leverington-Parsons-Drove, and a separate collector for each, but in the assessment for Leverington, part of the lands for Leverington-Parsons-Drove are included, and so vice versâ; that there is a separate constable for each, and that Leverington has churchwardens and Leverington Parsons-Drove chapelwardens.

The register of electors for voters for Cambridgeshire, in which register, Leverington and Parsons-Drove are treated as separate parishes, and separate lists of voters are accordingly given.

Other unimportant evidence was adduced by the defendants, and set out in the case.

The questions for the opinion of the Court were, whether the land in Leverington-Parsons-Drove passed under the devise by the testator, of all his messuages, &c., lying in Leverington.

F. Kelly for the plaintiff. These lands do not pass by the devise. It clearly appears throughout the whole of the evidence given by the defendants, that though Leverington-Parsons-Drove was originally part of the parish of Leverington, and is so still in some sense, yet that it is commonly known and described as a distinct place, and that in many respects it is independent of the mother parish. And in the will, Leverington, and Leverington-Parsons-Drove are recognized as distinct places, for the testator describes himself as "of Leverington in the Isle of Ely," and the defendant Johnson as "of Leverington-Parsons-Drove, in the said Isle of Ely." In *Stock v. Fox*, Cro. Jac. 120, "the case was, there being two villis, viz. *Walton* and *Street*, in the parish of *Street*, a fine was levied of such lands in *Street*,—and whether the lands in *Walton* did pass by that fine was the question, the action (ejectione firmæ) being for them only;—and adjudged that they should not pass, for *Street* being a distinct vill by itself, and *Walton* being a distinct vill by itself, and so found by verdict, although *Street*, the parish comprehends both, yet in the fine the lands in *Walton* shall not be said to be comprised, unless *Walton* had been an *hamlet* of *Street*, and that the fine had been levied of lands in the parish of *Street*. Then all had well passed: wherefore it was adjudged accordingly." In *Rex v. Sir Watts Horton*, 1 T. R. 374, it was held, that "wherever there is a *constable* there is a *township*." In this case there are separate *constables* for these two places, which therefore constitute separate *townships*; and the devise is not all of the testator's lands in the parish of Leverington. It appears that the testator had lands in Leverington upon which the devise operated, without having recourse to the lands in question.

Some of the evidence given by the defendants was not admissible. [Lord DENMAN, C. J. The register of voters seems to be quite out of question. Mr. *Andrews*, we should like to hear you.]

Biggs Andrews, contrâ. Extrinsic evidence is receivable to show what lands come within the description contained in the will. It was shown by the defendants that the lands in question are within the parish of Leverington, and the devise is of all lands in Leverington, which must be taken to mean in the parish of Leverington. The will must be construed most strongly in favour of the devisee. *Stock v. Fox* cannot govern this case, as there the parish was divided into two distinct villis, which is not the case here. [Lord DENMAN, C. J. Surely you carry the argument too far, if you contend that where there is a parish of a particular name, and a man devises land as in a place of that name, *all* his lands in the parish must *necessarily* pass, although some of them lie in a part of the parish which is commonly known by a different name. Surely, in such case, you must have evidence to show the probable intention of the testator. I should have agreed with you, if the devise had been of all lands in the parish of Leverington.] It is clear that the testator meant to speak of Leverington as a parish, as he classes it with *Wisbech-St. Peter's* and *Wisbech-St. Mary's*, by which names *parishes* are obviously intended to

be designated. The evidence shows that the lands in question are lands *in Leverington*; and the fact of that part of the parish of Leverington in which they lie, being commonly designated by a distinct name, does not raise such an ambiguity as will warrant the admission of evidence of intention, for the principle might often be applied to particular *estates*. To support the argument of the plaintiff, the devise must be read as if it had been "all my lands in Leverington, *except such as lie in Leverington-Parsons-Drove*." It being shown by evidence what lands the words of the devise are capable of including, according to their literal construction, no further evidence is receivable. *Doe d. Templeman v. Martin and another*, 4 Barn. & Ado. 771, (23 E. C. L. R. 159.) [WILLIAMS, J., referred to *Doe d. Chichester v. Oxenden*, 3 Taunt. 147; 4 Dow, Parl. Cases, 93; *Doe v. Greening*, 3 Maule & Selw. 171. LITLEDALE, J., referred to *Waldron v. Ruscurit*, 1 Ventris, 170.

Where it is apparent upon the will that the testator *intended* that certain lands should pass, they must be held to pass if the words used by the testator are at all sufficient for that purpose; *Fen d. Lowndes v. Lowndes*, 4 Burr. 2246. Here, the words are clearly *sufficient*; and it is impossible to read the will without seeing that the *intention* was that these lands should pass,—in other words,—that the testator meant not to die *intestate* as to any part of his property. He makes a large bequest of money to his heir at law, he describes his real estate with minuteness, and makes careful limitations of it in favour of certain branches of his family; and he concludes by a residuary bequest, in trust, of all such personal property as had not been previously disposed of. An intention to dispose by will of *every* portion of his property is quite obvious.

F. Kelly, in reply. The heir at law cannot be disinherited except by clear unambiguous words. (a) This principle of law is full as strong as the inference drawn from the supposed intention of the testator not to die *intestate*. In *Habergham v. Vincent*, 2 Vesey, jun. 224, it was held by WILSON, J., that "the heir will take what is not disposed of, even against the intention." *Waldron v. Ruscurit* goes as far as any case that can be found for passing lands not within the strict meaning of the description, but in that case, as in *Stock v. Fox*, an *exception* is made, which is decisive of this case, for here there are distinct *constables* for Leverington and Leverington-Parsons-Drove. In all the documents given in evidence, and even in the will itself, these two parts of the parish of Leverington are designated by the names of Leverington, and Leverington-Parsons-Drove. The mere fact of the latter place being *commonly known* by a distinct name, is of itself sufficient to exclude these lands from passing under this devise.

LORD DENMAN, C. J.—There are very strong arguments on both sides. In cases of this sort, it is especially necessary to distinguish, more than has been done here, between the functions of the judge and the jury. We have, however, no objection to decide whether the evidence is admissible, and what is the effect of it,—provided both parties agree to be bound by our decision,—in order to avoid the expense of sending the case back for trial.

The counsel agreed that a clause should be inserted in the case, to the effect that the parties agreed to be bound by the decision of the Court upon the evidence.

Cur. adv. vult.

(a) As to this supposed principle of law, see 4 Mann. & Ryl. 71, (d.) note to *King v. Ringslead*

Lord DENMAN, C. J., in the course of the same term, delivered the judgment of the Court as follows :

Ejectment, by heir at law, for certain lands situate at a place called Leverington-Parsons-Drove, whereof his ancestor died seised. Defence under the will of that person, by which he devised to the defendant all his lands at Leverington ; and evidence was offered to show that the lands sought to be recovered were in the *parish* of Leverington. The same evidence, however, proved that within the parish of Leverington was a district known by the name of Leverington-Parsons-Drove, for which a chapel of ease had been endowed in the fourteenth century,—that constables and other officers were appointed for Leverington-Parsons-Drove separately from the parish at large, and that separate assessments of taxes were made for Leverington-Parsons-Drove. The defendant further proved some ancient documents, (which accompanied the title to this property,) in which some lands situate in Leverington-Parsons-Drove had been conveyed as lands situate *in Leverington*. The plaintiff drew attention to the fact that the will and codicil distinguished Leverington from Leverington-Parsons-Drove, describing the deviser as residing at Leverington, and describing one of his trustees as living at Leverington-Parsons-Drove. The plaintiff also produced some other evidence, but of so trivial a nature and so recent, that it could reflect no light on the former condition of the places, nor on the *intention* of the testator in framing his will. In fact, we have thrown it wholly out of our consideration.

We are to decide, on the special case submitted to us,—1. Whether the defendant did not at once entitle himself, under the will, to these lands, by proving them in the *parish* of Leverington, and whether therefore the *jury* could properly be required to consider whether this will passed such of the testator's lands in Leverington as lie in Leverington-Parsons-Drove also ; and 2ndly, we have undertaken, if the evidence produced be admissible, to decide upon its effect ;—thus placing ourselves in the situation of jurymen, by consent of both parties.

The testator died seised of about sixty acres in that part of the parish which is not Leverington-Parsons-Drove, and about eighteen acres within that part.

The first point involves some of the most curious learning in the law of evidence. The greatest judges have entertained much doubt, and have differed in opinion on the rules by which the admissibility of evidence should be governed ; and in every case where they must be resorted to, ingenious and plausible arguments may be urged on both sides. Lord Chief Justice MANSFIELD, delivering the judgment of Common Pleas in *Doe d. Chichester v. Oxenden*, (a) with the caution which marks many of the decisions, observes on the extreme jealousy which prevails in receiving evidence to explain written instruments, and rejects that which was there tendered, though convinced that he thereby defeated the intention. Here, however, it cannot be truly said that the admissibility of the evidence is in question,—for the *devisee*, in the course of proving these lands to be in Leverington, proved them also to be in Leverington-Parsons-Drove, and raised a very serious doubt whether the testator meant to pass them. The form of the objection is rather this ;—that when shown to be in Leverington, the learned judge ought to have told the jury that they were bound to find for the defend-

ant, and had no right to inquire whether lands, which answered the *description* in the will, were or were not *intended* to pass by it. I should feel very great difficulty in coming to this conclusion on general grounds, and do not find it easy to state the principle which leads to it. But there is no necessity for the long discussion that such a point would demand, for we think the defendant entitled in either view of the case. If it is enough to show that the lands are in the parish of Leverington, he has done so; and if the question is properly raised, whether they were intended to pass, being in the particular portion of the parish, we are clearly of opinion on the whole case that in fact they were *intended* so to pass.

The structure of the will, particularly the large bequest of money to the heir at law, and the minute provisions for his kindred, gave rise to many arguments in favour of the proposition, that the testator meant to die intestate as to no part of his property. The evidence, if proper to be admitted and taken into consideration, proves only that such *may* have been his meaning: no circumstance whatever proves that it *was* his meaning, or shows that the language he used bore in his mind any other than the natural sense, according to which the term "Leverington" comprehends all that belongs to the parish, whether found in a subdivided portion of it or not. But we do not altogether rely on this view. We think it may be enough to observe, that though, if the description of locality had been "Leverington-Parsons-Drove," that would have been *exclusive* of every other part of the parish, yet the use of the *larger* term is so far from being exclusive of the less, that it embraces it.

Postea to the defendants.

REX v. The Justices of the County of CARNARVON.—p. 364.

Where, in an affidavit to found a motion, the addition of a deponent is omitted, the Court will not inquire whether the facts sworn to by a co-deponent are sufficient to support the application.

When a bastard child becomes chargeable a month before the Epiphany sessions, an application for an order to charge the putative father is not too late at the Easter sessions; *semble*.

The sessions cannot entertain an application, by the overseers of a parish, for an order to charge the putative father of a bastard child, without direct proof of notice to such putative father, notwithstanding his *appearance* in Court.

A BASTARD child, born on the 13th November, 1834, became chargeable to the parish of Llanfihangel-y-Pennant three weeks after birth. An order under 4 and 5 W. 4, c. 76, s. 72, on one Williams, as the putative father, was applied for at the Carnarvonshire Easter sessions, 1835, by the overseers of that parish. The justices considered that the application ought to have been made at the Epiphany sessions, and was now too late, and refused to make the order.

Archbold, in Easter term last, moved for a rule for a mandamus to the justices to hear the application, and contended that the words (in s 72) "may apply to the *next* General Quarter Sessions," were *directory* only, and did not preclude the overseers from applying at any subsequent sessions; that if the limited construction given by the sessions to these words were to be adopted, the enactment would in many cases be ineffective, as the overseers might often be unable to procure suffi

cient evidence to substantiate the charge against the putative father until after the first sessions; that sect. 73, by providing that in case an order be made against the putative father, the maintenance of the child shall be calculated from its birth, if that shall have taken place within six months previously, but if the birth shall have taken place more than six months previously, the maintenance shall be charged for six months only,—plainly indicates that the legislature contemplated that an application under sect. 72 might be made after the child had been *chargeable* more than six months.

The Court granted the rule nisi.

In the affidavit upon which the rule was obtained, the deponents were described as "Owen Jones, of Wanpeny Cogwyn, and Owen Evans, of Dewmbach, *late overseers of the poor of the parish of Llan-fihangel-y-Pennant*, in the county of Carnarvon, and Robert Williams, of Carnarvon, in the said county, attorney at law."

J. Jervis, on showing cause, objected that the affidavits could not be read, on the ground that they did not contain the proper additions of the deponents, Jones and Evans, pursuant to Reg. H. T. 2 W. 4, No. 5, which directs that "the addition, (a) of every person making an affidavit shall be inserted therein."

Archbold, contra, urged that Robert Williams was properly described, and that enough of the matters in the affidavit were deposed to by him to enable the Court to decide the question intended to be raised.

Lord DENMAN, C. J.—The affidavit is not in the form required by the rule of court. We cannot go through it to see how much Robert Williams has deposed to.

Per Curiam.

Rule discharged. (b)

The affidavit having been amended and re-sworn, the Court granted a second rule.

J. Jervis in this term showed cause upon an affidavit, which stated, that upon the hearing of the case at the sessions, the overseers being called upon to prove their notice of application, put in a paper purporting to be a notice or a copy of a notice to Williams, but not signed. There had been no notice to produce any original notice. It was objected that this evidence was insufficient; but the sessions overruled the objection.

He was stopped by the Court.

Archbold, contra, contended that the party must, by his *appearing* in pursuance of the notice, be considered as having *waived* any right to object that the notice was insufficient; that the paper which was put in was a mere *copy* of the notice; and that it lay upon the party, defendant, to produce the real notice, and show that it was insufficient.

Lord DENMAN, C. J.—It is quite clear that the notice was insufficient. The objection was taken, and was never waived. We cannot enter into the other question.

Et per Curiam.

Rule discharged, without costs.

(a) Vide 2 Inst. 665.

(b) And see *Lawson's Case*, 3 Tyrwhitt, 489.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

Michaelmas Term,

IN THE

Fifth Year of the Reign of William IV.—1835.

BROAD v. MCALMAR.—p. 413.

Where A. employs a broker, B., to procure a charter-party, on a commission of 5 per cent., to be paid whether the contract be executed or abandoned, A. cannot, under a plea of payment of a smaller sum and non assumpsit ultra, give evidence of a subsequent agreement to accept 2½ per cent. only, on account of the abandonment of the contract.

But where the terms of the original contract are only inferred from the usage of the trade, a conversation in which B. agrees to take 2½ per cent. only, on account of the abandonment of the contract, is admissible, to show that such reduction was, as a contingent reduction, part of the original contract.

ASSUMPSIT for 52*l*. Plea, payment as to 26*l*., and non assumpsit as to the rest. At the trial before Lord DENMAN, C. J., at the London sittings after last term, the following facts appeared :

The plaintiff, a ship-broker, had procured for the defendant, a ship-owner, a charter-party for a homeward-bound cargo of logwood from South America. Five pounds per cent. is the commission usually paid for procuring a charter-party on goods from South America, and the abandonment of the contract by the ship-owner does not affect the broker's right to commission. The defence was, first, that the defendant had received no benefit from the charter-party : and, secondly, that some time after the charter-party was made, the defendant not being able to procure an outward cargo to South America, induced the plaintiff to agree to take only two and a half per cent. It was objected that this agreement was a new contract, which should have been specially pleaded, and was inadmissible in evidence upon the present record. Lord DENMAN was of opinion that it was admissible, as showing what was the *original* contract between the parties. A verdict was found for the defendant, but leave was given to the plaintiff to enter a verdict for 26*l*.

M. D. Hill now moved accordingly. The second branch of the defence set up was not admissible under the plea upon the record. It was a

new agreement entered into subsequently to the original contract, and ought to have been pleaded. It was subject-matter for a plea of accord and satisfaction; for the original contract was unquestionably for the commission at the usual rate, viz. 5*l.* per cent. *Fidgett v. Penny*, 1 Crompt. M. & R. 108, is precisely in point. This is one of those cases which is not only within the letter, but also within the spirit of the new rules.

Assuming that the new agreement was admissible in evidence, under the plea, there was no *consideration* for it. The rule of law is, that after breach of a contract, a discharge is not good without deed or consideration.

LORD DENMAN, C. J.—We all think that this evidence would not have been receivable if it could be considered that the original contract was proved to have been, to pay the full commission. But I left the evidence to the jury, as showing what that contract was. The question I left to the jury was, whether the conduct of the plaintiff did not show that under the circumstances he was to have only two and a half per cent. My own impression was, that, under the circumstances, the broker was to have only half the usual commission, and that the contract to pay 5*l.* per cent. was not proved in such a way as not to be liable to be changed by subsequent circumstances, and that by the circumstances which did subsequently arise, it *was* changed.

PATTESON, J.—If the original contract was to pay 5*l.* per cent., evidence of an alteration of that contract subsequently made, could not be given in evidence under the plea upon the record. But the evidence was clearly receivable for the purpose of showing what the *original* contract was.

WILLIAMS, J.—The evidence which was received in this case was given to show what the *original* contract was, and in that point of view it was admissible, and fit for the jury to take into their consideration.

COLERIDGE, J.—Mr. *Hill* assumes, as the foundation of his argument, that the original contract was proved to be, that the defendant was to pay 5*l.* per cent. under all circumstances. The evidence received was given to show that under the circumstances which did arise, the contract was only to pay two and a half per cent.

Rule refused.

ROSSET v. HARTLEY.—p. 415

Where a rule is discharged, the party is not entitled to a second rule to the same effect, upon affidavits stating additional facts, which the party might have presented to the Court on the first motion.

Where reasonable diligence has been used to obtain the true christian name of a defendant, the plaintiff, upon a motion to set aside proceedings for irregularity, on the ground of misnomer, is protected by Reg. H. 2 Will. 4, l. 32.

But where the defendant was not *omissant* of the inquiries made respecting his name, a rule for setting aside the proceedings for irregularity, on the ground of misnomer, was discharged *without costs*.

THE defendant having been arrested, made an application, on the 12th of January last, to a judge at chambers, to be discharged on filing common bail, on the ground that he had been arrested by the name of

William Saville Hartley, whereas his real name was Wincombe Henry Saville Hartley. The judge refused to order the discharge of the defendant, who thereupon paid to the sheriff the sum sworn to, with 10*l.* for costs. The sheriff paid the money into court under 43 Geo. 3, c. 46, s. 2. Bail above not having been put in, the plaintiff made the usual motion in the Outer Court to take the money out of court, and a rule nisi was obtained, which afterwards, upon argument before the same learned judge, was discharged, on the authority of *Caddy v. Parsons*, 5 Taunt. 623, (1 E. C. L. R. 214.) *Cowling*, for the plaintiff, afterwards obtained a rule nisi, in the same form as before, to take the money out of court, on affidavits, stating circumstances (detailed in the latter part of this report) to show that the plaintiff had used due diligence in endeavouring to discover the defendant's name, in order to bring the case within the rule of Hilary term, 2 W. 4, r. 1, 32, and that the former decision ought not to be final. *Campbell*, A. G., subsequently, in Easter term last, obtained a rule calling upon the plaintiff to show cause why the proceedings should not be set aside for irregularity, and why the money should not be paid back to the defendant, and directing that the two rules should come on together.

Campbell, A. G., now showed cause against the plaintiff's rule. This rule being the same as was previously obtained and discharged, must necessarily be discharged also. The same rule cannot be repeated. The Court (a) then called on

Cowling, in support of the rule. There is no inflexible rule against the renewal of an application which has been once rejected by the Court. A second application cannot, it is true, be made *vexatiously* . There must be different grounds for it; and some explanation must be given to account for those grounds not having been brought forward in the first instance. Here, it is shown that reasonable pains to find out the defendant's name had been taken by the plaintiff. Applications to judges are frequently repeated after being refused on account of their being made upon imperfect affidavits. Besides, this objection ought to have been taken in the first instance, being in the nature of an estoppel, and it has been waived by obtaining a cross-rule directing both cases to come on together, which must mean that they shall be heard on their merits.

By the Court.—The rule is inflexible. All the grounds on which the plaintiff meant to rely should have been brought forward on the original motion. The rule nisi, in the present instance, was therefore irregular, and must be discharged with costs. (b)

(a) Patteson, Williams, and Coleridge, Js. Lord Denman was absent from severe indisposition.

(b) *The King v. The Sheriff of Devon.*—A rule nisi was obtained for an attachment against Partridge, the defendant, in an action of *Webber v. Partridge*, for the non-payment of a sum of money in pursuance of an award. After argument before Patteson, J., in the Outer Court, the rule was made absolute. The defendant took out a summons before Patteson, J., to show cause why the proceedings on the attachment should not be stayed, but that learned judge declined to review his former decision. *The Sheriff of Devonshire* levied under the attachment, and was subsequently ruled to return the writ. In Michaelmas term last, a rule was obtained by the defendant, calling upon the Sheriff to show cause why he should not retain the sum of 161*l.* levied under the attachment, until the further order of the Court; and why he should not refund to the defendant the sum of 10*l.* 2*s.*, levied at the same time for fees and poundage. The latter part of this rule was obtained on the ground that the sheriff had taken larger fees than he was entitled to. Against this rule Jeremy showed cause in the Outer Court before Littledale,

The affidavits upon which the second rule was grounded disclosed the following circumstances. The defendant's real name was Wincombe Henry Savile Hartley, and he had always passed by that name, or by that of Winchcombe Savile Hartley. The affidavits in answer stated that the agent of the plaintiff, who resides in Switzerland, knew the defendant there by the name of William Saville Hartley. Before the arrest, an application was made at the bank of Messrs. Hammersley, where the defendant's aunt kept an account, and upon that application the agent was informed that it was believed there that the defendant bore the last-mentioned name. Other circumstances were also stated to show the pains taken to ascertain the name.

Cowling now showed cause against the second rule. A similar application was refused at chambers during term time, and no objection having been made to the ruling of the judge, the defendant is precluded from making the rule absolute, by the decision which has just been pronounced. (a)

The plaintiff has used due diligence and brought himself within Reg. H. 2 W. 4, r. 1, c. 32, and the objection made by the defendant is in the nature of a plea in *abatement*, and such a plea must state that the defendant has always been known by one name. Such a plea, therefore, could not have been supported by the defendant, as he has not always been known by the same name. Objections of this sort should not be encouraged; as it is difficult, particularly for a foreigner, to ascertain the correct name. In a case argued yesterday, a person was before the Court whose christian name was compounded of five names; and it is very hard on a plaintiff to be saddled with heavy costs, because he may not have the means to ascertain, or the memory to recollect, all those appellations. [COLERIDGE, J. But if the plaintiff cannot take the money out, what is to become of it?] The plaintiff can take no steps until he takes the money out, by virtue of the statute of 43 Geo. 3, c. 46, s. 2; and since he cannot get it, he will be out of Court at the end of a year, and the defendant will have it as a matter of course, unless something intervenes; but if the defendant's present application is to have it *now*, it is too soon.

Campbell, A. G., in support of the rule. The conduct of the plaintiff is pertinacious. *Cadby v. Parsons*, 5 Taunt. 623, (1 E. C. L. R. 214,) decides that his proceedings are void. As to the variance in the name, it merely appears that the defendant has sometimes omitted writing "Henry." There will be no difficulty as to the plea in abatement; for the plaintiff may reply, that the defendant was as well known by one name as the other, if the fact be so. [PATTESON, J. This forms no answer to the argument founded on the new rules.] The plaintiff did not take sufficient pains.

By the Court.—We cannot say that reasonable diligence was not J., who referred the matter to the full Court. The rule was argued in Michaelmas term last before Lord Denman, C. J., Taunton, J., Patteson, J., and Williams, J.

Bere, for the defendant, admitted, that so far as the rule related to the 1617, it had been obtained for the purpose of reviewing the decision of Patteson, J.

By the Court.—The question has already been disposed of; and as the single judge represents the full Court, we cannot review the decision. If such applications were allowed, parties failing in the Outer Court would constantly come to this Court for a rehearing.

The remaining part of the rule and the costs of the rule were referred to the Master.

(a) That decision related to the determinations of a judge sitting in *banc* in the co-ordinate Outer Court, created by 1 W. 4, c. 70, s. 1, not to orders made at chambers, which were always subject to revision.

used to ascertain the defendant's name; and therefore the case falls within the rule.

The attempts to discover the name, however, appear to have been made behind the defendant's back; and there being nothing to show that they came to his knowledge, we think that the rule should be discharged *without costs*. (a)

Rule discharged, without costs.

(a) See *Finch v. Cocken*, 3 Dowl. P. C. 678.

WILTON v. CHAMBERS.—p. 431.

In discussing a rule nisi for an attachment against the sheriff for an insufficient return to a writ, the Court will not take cognizance of the return unless an office copy be produced, verified by affidavit, although there be an affidavit by a party as to his belief that no sufficient return has been made.

THE late sheriff of Dorsetshire having been ruled to return the writ of fieri facias in this cause, (a) made a special return, setting out all the circumstances arising out of Chambers's bankruptcy, the various rules, and the several facts set out in the report of this case. (a)

A rule was thereupon obtained by Sir *William Follett*, calling upon the sheriff to show cause why an attachment should not issue for the insufficiency of the return. The rule was drawn up on reading an affidavit of the plaintiff *Wilton*, and of a person who swore to the service of the rule to return the writ, and of another person who swore that he had searched for the return, and that "he was advised and believed that no sufficient return had been made." But no copy of the return was annexed to the affidavit.

Campbell, A. G., and *Barstow*, showed cause. The affidavits upon which this rule has been drawn up do not warrant the rule. The sheriff is called upon to answer for a supposed contempt, but the circumstances necessary to enable the Court to form a judgment do not appear. The rule assumes the insufficiency of a return which is not before the Court. It is not pretended that the sheriff has made *no* return. The belief of an individual as to its insufficiency does not warrant the Court even in calling upon the sheriff to make any answer. There should have been an office copy of the return verified by affidavit, and the rule should have been drawn up on reading it. The point is the same as that which was decided in *Sherry v. Oke*, 3 Dowl. P. C. 349.

Alexander, (with whom was Sir *William Follett*), contrâ. It would have been idle, if not vexatious, to burthen the proceedings with an office copy of a record already before the Court. The writ and return are supposed in fact to be in Court, as in point of law and for all practical purposes they undoubtedly are. The rule refers to the return, although it is not drawn up "on reading" it; and the Court must take judicial cognizance of a document already filed before them, and of which the law presumes them to be in full possession. The case cited is no authority for the present objection. There, the motion was to set aside an award, of which the Court could have no knowledge until brought before them. Indeed, it appears by that case that the Court

(a) See the report of this case in 3 Dowl. P. C. 333.

will take judicial notice of the *nisi prius* record in the action, although it be not verified by affidavit, (a) and although the rule *nisi* be not drawn up "on reading" it. That case therefore is, in principle, an authority *against* the objection.

By the Court.—We cannot properly pronounce upon the supposed insufficiency of a return which is not brought before us. Had no more been read to us when the application was first made than the affidavits, as upon reading which this rule has been drawn up, we should have refused to grant the rule, unless an office copy of the return, properly verified, were produced to us. The rule must be discharged, and, as it seeks to bring the sheriff into contempt, we think it should be discharged *with costs*. Parties who make such motions must, at their peril, come with proper materials.

Rule discharged, with costs. (b)

(a) See *Van Nieuwvel v. Hunter*, ante.

(b) The motion was renewed on the following day, upon an affidavit to which an examined copy of the sheriff's return was annexed; whereupon the Court granted a rule *nisi* for an attachment.

REED v. GAMBLE.—p. 433.

Assumpsit against the drawer of a cheque on a banker. Plea: that the amount for which the cheque was drawn was illegally won at play; and issue thereon. Unless notice has been given to produce the cheque, the plaintiff is not bound to produce it.

ASSUMPSIT against the drawer of a banker's cheque. Plea: that the cheque was given to secure money illegally won at play. (a) Replication: issue on the plea.

At the trial before WILLIAMS, J., at Guildhall, the plaintiff did not produce the cheque. The counsel for the defendant contended that he was bound to do so. When the defendant opened his defence, he called upon the plaintiff to produce the cheque; which he refused to do. No notice to produce had been given. The jury found a verdict for the plaintiff; and the learned judge gave the defendant leave to move to enter a nonsuit.

Butt now moved accordingly for a nonsuit or a new trial. The plaintiff should have produced the cheque, although he was not called on to prove it, the making of it being admitted on the record. At all events the defendant was entitled to have it produced as a part of his case.

Lord DENMAN, C. J.—The defendant was entitled to give notice and then call for the production of the cheque, for the purpose of going into secondary evidence, but it was not necessary for the plaintiff to produce it.

The non-production of the cheque did not prevent the defendant from going into his defence.

Rule refused. (a)

(a) Vide 5 & 6 W. 4, c. 41.

(b) Where, from the nature of the action, or from the form of the pleadings, it is obvious that the production of a particular instrument will be necessary, then, if even without notice it is withheld by the party in whose possession it is, the opposite party may go into secondary evidence of its contents. Thus, in trover for a bill of exchange, notice to produce the bill is unnecessary; per Gibbs, C. J., in *Scott v. Jones*, 4 Taunt. 868. And see *Bucher v. Jarratt*, 3 Bos. & Pull. 143; *Wood v. Strickland*, 2 Meriv. 461; *Rez v. Ackle*, Leach, C. C. 330; *How v. Ball*, 14 East, 274; *Jolley v. Taylor*, 1 Camph. 143; contra, *Cowan v. Abrahams*, 1 Esp. N. P. C. 50. Here, as the issue might have been proved by the defendant without the production of the cheque, no such obvious necessity appears to have existed.

The KING v. The Archdeacon of MIDDLESEX and another.—p. 494.

Where two sets of persons have each a colourable title to the office of churchwarden, both ought to be sworn in, *admitti*: (a)

Held, that the ordinary is bound to swear in churchwardens-elect immediately upon their applying to be sworn in, (b) notwithstanding an usage not to swear in until the first visitation after Easter.

(a) Or to a mandamus to swear in one of the two sets, &c., containing the usual surmise, that the prosecutors of the mandamus were duly elected, the officer may, at the peril of an action, return that the prosecutor was not duly elected. *Rex v. P. Williams*, 3 Mann. & Ryl. 402, 8 Barn. & Cressw. 681; *Anthony v. Siger*, 1 Hagg. 10. Such a return could not be quashed for insufficiency: *Rex v. P. Williams, ubi suprâ*. Nor does it appear to be traversable: *antè*, 296, n., 427, n.

(b) On the other hand, a churchwarden duly elected may be required by the Spiritual Court to take the oath of office before the proper ordinary. *Cooper v. Allnut*, 3 Phillim. 166.

The KING v. The NOTTINGHAM OLD WATERWORKS COMPANY.—p. 498.

Where a statute provides that a Waterworks Company shall make compensation for damage done in executing the works, and these works are restricted to a particular line, damage occasioned by executing the prescribed works is within the proviso, although the property injured be not within the line.

And *semble* that the act would protect the company from any action at law for the injury.

GOSBELL v. ARCHER.—p. 523.

Upon the trial of issues joined upon several counts, the plaintiff recovers on one of the issues with damages, the defendant having a verdict upon the other issues: The plaintiff afterwards, in pursuance of leave reserved, moves to increase the damages by adding certain sums, and a rule being granted, a special case is stated by the parties, in which the question submitted to the Court is, whether the damages ought to be so increased. Upon the argument of the special case, the Court hold, that the damages ought not to be increased, but direct judgment to be entered on another issue, in addition to that on which the verdict was taken. Held, that the defendant was entitled to the costs of the special case.

COOPER v. STEVENS and Wife.—p. 635.

The delivery of goods by a debtor to a creditor, expressed to be in diminution of the debt, is a sufficient part-payment to take a case out of the statute of limitations.

ASSUMPSIT for goods sold and delivered to the wife, *dum sola*. Plea: Non assumpsit *infra sex annos*. Replication: Assumpsit *infra sex annos*. At the trial before Lord DENMAN, C. J., at the last Gloucester assizes, it appeared that more than six years before the commencement of the present action, the plaintiff had sold and delivered hay to the wife, *dum sola*: In January, 1832, previously to her marriage, she requested the plaintiff to allow her to sell him some spirits, saying, "it will diminish the debt I owe you;" and a gallon of gin was subsequently sent by her to the plaintiff and accepted by him. It was objected, that this evidence was not sufficient to take the case out of the statute of limitations, and for this *Tippetts v. Heane*, 1 Crompt., Mees.

& Rosc. 253, was cited. The learned Chief Justice was of opinion that it was sufficient, and a verdict was found for the plaintiff for 54*l.* 14*s.*

Ludlow, Serjeant, now moved for a new trial, on the ground of misdirection. The evidence amounted neither to an acknowledgment nor to a part-payment sufficient to take the case out of the statute of limitations. All that it amounted to was, proof of a *special agreement* to deliver a certain quantity of gin, in consideration of the existing debt.

LORD DENMAN, C. J.—In *Hart v. Nash*, in the Exchequer, which had been tried before me at Kingston, it was held, that the delivery of a quantity of bats might be considered as *part payment*, so as to take the case out of the statute of limitations. We cannot find that that case has been reported. It appears to us to be precisely in point. We had better, therefore, see some of the judges of the Court of Exchequer.

Cur. adv. vult

LORD DENMAN, C. J., on a subsequent day in the term, said—On a motion for a new trial the question was raised, whether the delivery and acceptance of a quantity of gin, in reduction of a debt, operated as part payment so as to take the case out of the statute of limitations *Hart v. Nash*, in the Exchequer, was supposed to determine that point. We find that it does so. When goods are taken on an agreement in part payment of a debt, we consider such a transaction to *be* a part payment, so as to take a case out of the statute of limitations.

Rule refused.

SNELL v. BURNE.—p. 645.

A cause in which the defendant had been held to bail for 52*l.* is referred to an arbitrator, to whom also the question of costs generally, and of costs under 43 G. 3, c. 46, is referred: An award that 15*l.* 17*s.* was due to the plaintiff at the time when he held the defendant to bail, and that the verdict shall stand for that amount, and that the plaintiff had reasonable and probable cause for holding the defendant to bail, (without saying for what amount,) and that the defendant shall pay the costs of the cause, is sufficient.

PARTINGTON v. WOODCOCK.—p. 672. (a)

A., an insolvent debtor, who, with the permission of B., his assignee, remains in possession, and demises for years to C., may recover the rent from C., notwithstanding a notice from B. to C. requiring the reserved rent to be paid to him, as such assignee.

Semble also, that under a demise by A., mortgagor in possession, to B., A. may recover the reserved rent from B., notwithstanding a notice from C., the mortgagee, requiring B. to pay the rent to him, C. (b)

DEBT for rent due, March, 1834, upon a demise of premises for seventy years, made by the plaintiff to the defendant, in September, 1830. Plea: that before the making of the demise, to wit, in June, 1818, the plaintiff was a prisoner in the custody of the marshal, within the meaning of the act (53 Geo. 3, c. 102) for the relief of insolvent debtors, and petitioned the Insolvent Debtors' Court to be discharged,

(a) This case was decided in Easter term last.

(b) Overruling, in effect, *Pope v. Biggs*, 4 Mann. & Ry. 193, 9 Barn. & Cressw. 245, (17 E. C. L. R. 368.) And see 2 Roscoe on Actions relating to Real Property, 525; *Cooper v. Blandy*, 1 New Cases, 45, 4 Moore & Scott, 562, (27 E. C. L. R. 304.)

and was discharged by the Court; that by force of the statute all the estate, &c., of the plaintiff in the premises mentioned in the declaration, became vested in one Ewbank, as assignee thereof, duly appointed by the said Court, upon the trusts and for the purposes mentioned in the statute; that after the plaintiff had been duly discharged, according to the provisions of the statute, and after the making of the demise in the declaration mentioned,—the plaintiff having, with the permission of the Court, been permitted and duly authorized by Ewbank, as such assignee, and by one Shaw, who afterwards had been appointed and substituted by the said Court, in the place and stead of Ewbank, as such assignee, to remain in the possession and management of the premises in the declaration mentioned, and the plaintiff having, by the permission of the said Court, been also authorized and permitted by Shaw, as such assignee as aforesaid, to make the said demise to the defendant,—and before the said rent, or any part thereof, in the declaration mentioned, became due and payable, and before the commencement of the suit, to wit, on 23d May, 1831, the defendant received from Shaw, as such assignee, a notice and requisition that he, the defendant, should thenceforth pay to Shaw, as such assignee, the rent, and every part thereof that might and would then or thereafter accrue and become due and payable from the defendant, for and in respect of the demised premises, and under and by virtue of the said demise; and also, that in default thereof legal proceedings would be instituted by Shaw, as such assignee, against the defendant, for the recovery of the same; that such notice and requisition had not been revoked, altered, or countermanded. *Ratione cuius*, the defendant became and was and still is liable and compellable, from time to time, to pay to the assignee of the estate and effects of the plaintiff for the t. ne being, as well the rent in the declaration mentioned, as all other th. rent so reserved as aforesaid, by the said demise, for and in respect of the premises, as the same becomes and is due and payable, the reversion expectant on the determination of the demise not being now vested in the plaintiff, and the right and title of the plaintiff to sue for and receive the rent so reserved by the demise being by reason of the said notice wholly ended and determined. Verification, &c.

Special demurrer, (a) and joinder.

F. Kelly, in support of the demurrer. The plea, supposing it to be good in point of *form*, is substantially a plea of *nil habuit in tenementis*. (b) The defendant admits that he holds under the demise by the plaintiff, but attempts to deny that the plaintiff had any thing in the

(a) The causes shown were, that the plea is double, in that it indirectly denies that the plaintiff had any thing in the premises during the period in respect whereof the rent is claimed, and also affirms an eviction by Shaw; that it is argumentative, in that it indirectly and argumentatively denies that the plaintiff demised, that the plaintiff had any thing in the premises during, &c., and indirectly, &c. alleges an eviction by Shaw; and also that it does not specifically deny any fact alleged in the declaration, or plead in confession and avoidance; and also, that the plea attempts to deny the title of the plaintiff, whereas the defendant is estopped to deny the same, it appearing by the declaration that the defendant enjoyed the same by virtue of the demise by the plaintiff in the declaration mentioned.

(b) In *debt or covenant*, upon a lease, (not being by deed indented,) *nil habuit in tenementis*, although it admits a demise in fact, is a good plea; (*Syllivan v. Stradling*, 2 Wils. 208, 217;) and though it is a bad plea in bar to an avowry, it is so because *before* the passing of 11 Geo. 2, c. 19, such a plea would have been too sweeping a denial of the title set out in the avowry, and because *since* that statute such a plea in bar would render nugatory the power of avowing generally, given by the 22d section of that statute.

premises. [COLERIDGE, J. Is not *nil habuit in tenementis* a good answer when the demise is not by indenture? In a note to *Duppa v. Mayo*, 1 Wms. Saund. 276, (b,) by Mr. Serjt. Williams, it is said, that in an action for rent upon a demise not stated to be by indenture, *nil habuit in tenementis* is *primâ facie* a good plea, because no estoppel appears upon the record.]—Whether the action be debt on a demise by deed, or assumpsit for use and occupation, the tenant is equally estopped from denying his landlord's title at the time of the demise. In the former case there is a strict estoppel upon the record; in the latter, the case is not one of strict estoppel, but it is *in the nature* of an estoppel, for the tenant is prevented by the rules of law from disputing the lessor's title; *Wilkins v. Wingate*, 6 T. R. 62; (a) *Doe d. Bristow v. Pegge*, 1 T. R. 758, in a note to *Goodtitle v. Morgan*. [LORD DENMAN, C. J. That has been over-ruled, with respect to the case of the tenant setting up the title of the mortgagor of his lessor, by *Pope v. Biggs*, 4 Mann. & Ryl. 193. 9 Barn. & Cressw. 245, (17 E. C. L. R. 368.) [LITTLEDALE, J., referred to *Moss v. Gallimore*, 1 Dougl. 279. LORD DENMAN, C. J. That case is distinguishable; as there, at the time of the demise, the mortgagor had a good title, the mortgage being *subsequent* to the demise.] In *Bulls v. Westwood*, 2 Campb. 11; it was held, that in an action for use and occupation, where the defendant has come in under the plaintiff, he cannot show that the plaintiff's title has expired, unless he solemnly renounced the plaintiff's title at the time, and commenced a fresh holding under another person; *Curtis v. Spitley*, 1 New Cases, 15, S. C. 1 Scott, 737, (27 E. C. L. R. 291.)

Wightman, contra, said, that he did not mean to contend that *nil habuit in tenementis* would be a good plea, and urged that the plea in question was not, in fact, such a plea. [LITTLEDALE, J. You admit a demise by the plaintiff, but show a title in another party, and state that the demise was by his permission. LORD DENMAN, C. J. If he authorized the plaintiff to demise, did he not authorize him also to receive the rent?]

F. Kelly. It is no answer for the defendant to show a title in another party, and state that the demise was by his permission. [LORD DENMAN, C. J. It is not stated that the party permitting was to have the power of putting an end to the tenancy by notice.] It does not appear that the tenant had any notice (b) that the plaintiff demised only by the

(a) As to the distinction between estoppel by indenture, which continues as long as the indenture is in force, and estoppel by accepting possession, which continues whilst that possession continues, vide *Fleming v. Gooding*, 10 Bingh. 549, 4 Moore & Scott, 455, (25 E. C. L. R. 239.)

(b) But where it appears upon the face of the instrument of demise, (although the demise be by deed indented,) that the lessor had not an original power of demising, it would seem that an estoppel does not arise. Thus where A. having only an equitable estate in a copyhold, demised for 98 years, by an indenture in which was recited a licence from the lord to demise, granted not to A. but to B., it was held that the assignee of A. could not sue as assignee of the reversion, upon the covenants in the indenture of demise, although previously to the execution of the assignment A. had acquired the legal estate in the copyhold in fee simple; *Whitton v. Peacock*, 2 New Cases, 411.

Though the grounds on which the Court of C. P. certified to the Master of the Rolls, in *Whitton v. Peacock*, that the action of covenant would not lie, do not, of course, appear, it is conceived that there could be no estoppel in a case where the recitals rendered it necessary to connect A. the lessor, not only with B. the licensee, but also with the licensing lord,—whose title being an *actual* legal title, could not be connected with, and thus support, the estate of A., which was by estoppel.

The argument in *Whitton v. Peacock* proceeded upon a different ground,—viz. that the assignee of a reversion gained by estoppel, is not such an assignee as is enabled to sue by 32 H. 6, c. 34,—even where, prior to the assignment, the lease by estoppel has been turned into a

permission of the assignee. The demise is by the plaintiff alone, and it is no answer to say that a party who had a superior title, has since given notice to the tenant to pay the rent to him. [LITLEDALE, J. The permission to remain in possession and management of the premises, and to make the demise, is only stated in a *parenthesis*.] (a) If it was intended to say that the plaintiff demised only as the agent of the assignee, that should have been distinctly stated.

Wightman, *contra*. The plea is intended merely as a denial of the right of the plaintiff to recover the rent claimed in the declaration. The argument which it is proposed to offer in support of the plea, is founded entirely on the analogy between this case and that of a demise by a mortgagor. The analogy between the two cases is strict. If the plea had stated, that before the making of the demise mentioned in the declaration, to wit, in January, 1818, the plaintiff mortgaged the premises to Shaw, and that after the making of such demise,—the plaintiff having been authorized and permitted by Shaw, as mortgagee, to remain in the possession and management of the premises, and permitted by him, as such mortgagee, to make the said demise of the premises to the defendant,—and before any part of the said rent mentioned in the declaration became due and payable, and before the commencement of the suit, to wit, on, &c., the defendant received from Shaw, as such mortgagee, a certain notice and requisition,—and so on, following the form of the plea,—there can be no doubt that according to *Pope v. Biggs* the plea would have been an answer to the plaintiff's demand. BAYLEY, J., there says, "I have no doubt that in point of law a tenant who comes into possession under a demise from a mortgagor, after a mortgage executed by him, may render the mortgagor his landlord, so long as the mortgagee allows the mortgagor to continue in possession and receive the rents; and that payment of the rent by the tenant to the mortgagor, without any notice of the mortgage, is a valid payment. But the mortgagee, by giving notice of the mortgage to the tenant, may thereby make him his tenant and entitle himself to receive the rents." [PATTESON, J. I never could understand how the notice of the mortgagee could make the lessee tenant to him at the reserved rent. If the tenant, in consequence of such notice, pays him the rent, I can understand that the relation of landlord and tenant has been created. LITLEDALE, J. If the tenant refuses to pay, can the mortgagee bring any thing else than *ejectment*?] It is submitted that he may bring an action for *use and occupation*, and the covenant for rent in the deed may be looked to for the purpose of measuring the amount of damages.

lease in interest by the intermediate acquisition of the legal estate;—a position which seems to be at variance with the received doctrine as to estoppel and privity. It is true that a plaintiff in covenant may declare upon his *own* demise by a *quod cum dimisisset*, without showing title, and that a declaration by an *assignee* must show the title of the lessor: This is because where the *lessor* sues, it is immaterial whether his reversion be for years, for life, in tail, or in fee, whereas a party suing as *assignee* must show himself to be *such* an assignee as the quality of the reversion requires; which cannot be done without disclosing the estate of the lessor. Where the declaration alleges that A. being seized in fee demised to B. for years, and assigned the reversion to the plaintiff, though it would be *prima facie* a good plea to say that A. at the time of the demise was not seized, or had nothing in the land, *supra*, 673, (b) (and an issue taken thereon would be found for the defendant and bar the action.) the plaintiff, instead of accepting such an issue, might reply that the lease was by indenture, and conclude by relying on the estoppel. If the indenture were stated in the declaration, the plea would be bad on demurrer; 1 Wms. Saund. 325 n. (4.)

(a) Vide 1 Wms. Saund. 117 a, (4;) *antè*, iv. 274, judgment of Taunton, J., in *Bowman v Taylor*.

[Lord DENMAN, C. J. The mortgagee might go and say to the tenant, "I am entitled under this mortgage, and will turn you out, or bring ejectment, unless you pay me rent;" and if the tenant in consequence paid rent, the mortgagee would be thenceforward entitled to recover for use and occupation. PATTESON, J. I can easily understand *that*. It would be the creation of a new tenancy. Lord DENMAN, C. J. It is clear that the judgment in *Pope v. Biggs* assumes an eviction or attornment, 4 Mann. & R. 197, (b) 200.] All that appeared was, that the mortgagees had given a notice to the tenants, stating that the interest was in arrear; that they were thereby required to pay the amount of such interest in part of the rent and similar sums out of future rents, until further notice; and that in default of such payment, they, the mortgagees, would pursue such remedies as were allowed by law for recovering the same. No eviction or attornment, nor any thing from which an eviction or attornment might be inferred, is stated. Suppose the words in the parenthesis to be out of the plea, then it is clearly good *Curr and others, Assignees, v. Burdiss*, 1 Crompt. Mees. & Rosc. 443, 782, 5 Tyrwh. 309. [PATTESON, J. Throughout the plea, the demise by the plaintiff is treated as a subsisting demise, and the rent claimed is the rent reserved by that demise. It seems to me impossible, when the demise is made by the insolvent in his own name, after his insolvency, for the assignee to come and claim rent, unless he puts an end to the demise and creates a new tenancy. This plea, or a similar plea in the case of a mortgagee, cannot be good without making the assignee or mortgagee in some way, in effect, party to a deed which he did not execute.] The plea states enough to show that the assignee is entitled to the profits of the estate. That part of the plea which claims the rent as due under and by virtue of the demise mentioned in the declaration, being matter of little meaning, may be rejected as surplusage. [LITLEDAL, J. I do not see how you are to reject those words.] The plea would have been sufficient without them, and the insertion of them does not vitiate it.

If the Court cannot hold the plea good, it is prayed that they will allow the defendant to amend.

Lord DENMAN, C. J.—You had better amend. You must amend very shortly,—and upon payment of costs.

Et per Curiam.—Leave to amend on payment of costs. (a)

(a) And see *Doe v. Huddart*, 2 C. M. & R. 316, 4 Dowl. P. C. 437.

PANTER and others v. SEAMAN.—p. 679. (a)

A rule nisi to revive a judgment against the executors of a deceased defendant, must be served on all the executors who have proved the will.

Where a rule is served by leaving a copy with a servant, an inquiry should be subsequently made of the servant whether the master has received the copy.

IN 1816, judgment had been entered up against the defendant, who died, leaving four executors. The will was proved by two of them, namely, Street and Branen,—the former, a merchant, in partnership with Mr. Gilbert; the latter, a solicitor, residing in Gray's Inn. A rule nisi was obtained for a sci. fa. to revive the judgment. In the course

(a) This and the next case were decided in Trinity term last.

of this term, *Manning* moved to make the rule absolute, upon an affidavit made by a clerk of the plaintiff's attorney, which stated as follows. That on the 30th May last, he served Street, who, the deponent had been informed and believed, was one of the executors of the defendant, with a true copy of the rule, by delivering to and leaving such true copy with Mr. Gilbert, the partner of the said Thomas Street, at the house or office of the firm of Messrs. Street and Gilbert, in Brabant Court, Philpot Lane, in the city of London, and that at the time of such service he showed to the said Mr. Gilbert the said original rule. That on the 30th May last he served on George Branen, who, deponent believed, was another of the executors of the defendant, another true copy of the rule, by putting the same through a hole in the door of the chambers of the said Geo. Branen, in Gray's Inn Square, and that he called on the 1st of June then next following, for the purpose of re-serving the rule, but that the chambers of the said Geo. Branen were closed, and that on the 2d of June he called again at the chambers of the said G. Branen, but that the chambers were closed; that afterwards, on the 2d of June, he served a copy of the rule on E. H., the laundress of the said G. Branen, at his said chambers, when the said E. H. informed the deponent that the said G. Branen would duly receive the said copy of the rule, and that he did, at the time of such service, show to the said E. H. the original rule.

Manning in support of the motion. The service on Branen is, under the circumstances, sufficient. [LITLEDAL, J. You should have called the next day.] The service on Street is clearly good, and service on *one* executor is sufficient. [LITLEDAL, J. You ought to serve a copy on *each* of them; they are not like partners.]

By the Court—

Rule refused.

GLASIER v. COOKE.—p. 680.

An execution creditor served with a sheriff's rule under the Interpleader Act, is not bound to appear where there are no goods liable to his execution. Where, therefore, such creditor appears upon the rule, but does not insist upon any goods being liable to his execution, he is not entitled to the costs of his appearance.

THE plaintiff issued a fi. fa. into Kent. The sheriff's officer informed the plaintiff's attorney that the defendant's goods had been seized under a prior writ. The plaintiff did not withdraw his writ, or give notice that he withdrew his claim. A third party having claimed the goods, the sheriff obtained a rule under the Interpleader Act.

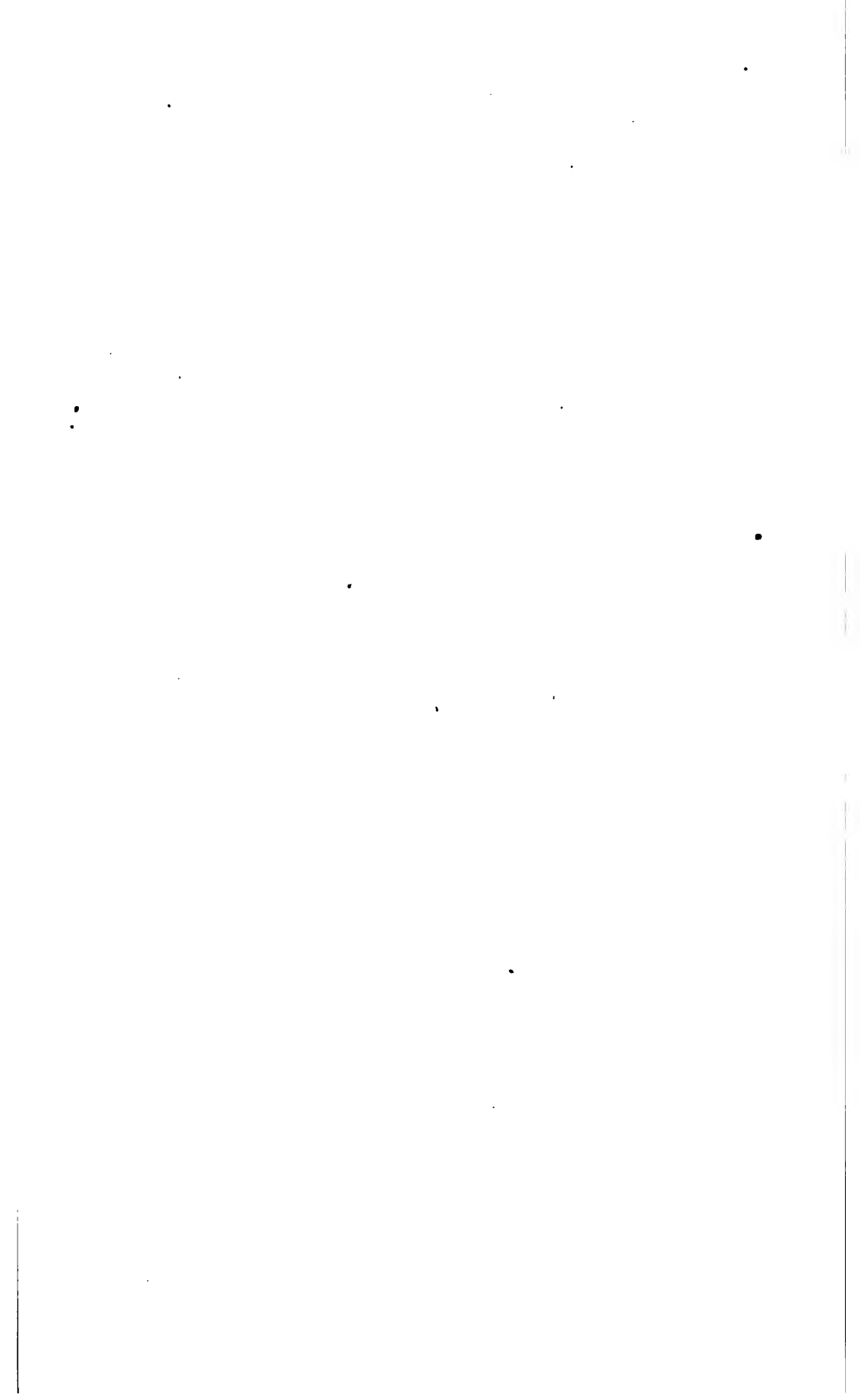
Busby, for the plaintiff. The rule ought to be discharged *with costs*. Under the circumstances, the sheriff had no right to bring the plaintiff before the Court.

Clarkson, for the sheriff. The sheriff was bound to serve the rule on all parties who had issued writs which remained in his office. If the plaintiff did not intend to make a claim, he need not have appeared.

LORD DENMAN, C. J.—There was no occasion at all for the plaintiff to appear if he intended to relinquish. He is certainly not entitled to costs.

Rule discharged,—as to the plaintiff
without costs. (a)

(a) And see *Johnson v. Brasier*, ante iii. 654.



REPORTS OF CASES
ARGUED AND DETERMINED
IN THE
COURT OF KING'S BENCH,
AND
Exchequer Chamber.

By S. NEVILE, Esq., OF THE INNER TEMPLE,
AND
W. M. MANNING, Esq., OF LINCOLN'S INN,
BARRISTERS AT LAW.

VOL. VI.

**CONTAINING CASES IN HILARY, EASTER, AND TRINITY TERMS, IN THE
SIXTH YEAR OF WILLIAM IV.**

1836.

PHILADELPHIA:
T. & J. W. JOHNSON & CO., LAW BOOKSELLERS,
NO. 197 CHESTNUT STREET.
1857.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF KING'S BENCH,
IN
Hilary Term.

IN THE

Sixth Year of the Reign of William IV.—1836.

PALMER v. TEMPLE.—p. 159.

Declaration on a contract to demise and deliver possession upon a certain day. **Breach**: in non-delivery of possession. **Plea**: that the principal subject-matter of the contract was in the defendant's own occupation, and that he was always ready, willing, and able to demise and deliver possession of the same to the plaintiff: that the residue of the tenements, consisting of a few cottages, was occupied by certain persons as tenants to the defendant, and that at and upon the time of making the agreement, it was agreed that the defendant should not cause the tenants to quit the said cottages, but that on the defendant's completing the said agreement, the tenants should attorn to the plaintiff, and become his tenants; and the plaintiff then discharged the defendant from giving the plaintiff actual possession. In the absence of direct evidence of such an agreement as that set forth in the plea, proof that the plaintiff was aware that the cottages were occupied by weekly tenants, and that he never gave the defendant to understand that he should require to be put in actual possession of them until the very moment when the parties had met for the purpose of concluding the bargain, and when there was not sufficient time left to obtain possession from the tenants, may properly be left to the jury as entitling them to consider whether the conduct of the plaintiff did not show that he had assented to waive a literal performance of the contract, and to accept the occupation of the tenants in lieu of an actual delivery of possession.

ASSUMPSIT, to recover the deposit on a sale of certain leasehold premises, and also 1000*l.* or liquidated damages, agreed to be paid by either party refusing to perform his part of the contract of sale. The first count of the declaration stated, that by a memorandum of agreement between the defendant and the plaintiff, the defendant, in consideration of 300*l.* to him then paid by the plaintiff by way of deposit, and in part of 5500*l.*, agreed to be given by the plaintiff for the purchase of the messuage thereafter mentioned, and for the trade, goodwill, and possession thereof, and of the residue of such purchase money to be paid as thereafter stipulated,—did agree that he would, on or before 24th June then instant, demise unto the plaintiff all that messuage or public-house, called the "Somers Town Coffee-house," situate, &c., with the yard, outbuildings, and appurtenances thereto belonging, for 47 years from the said 24th June, subject to the rent of 80*l.*, and would

deliver to the plaintiff the possession of the said messuage and premises on or before 24th June then instant. And for the considerations aforesaid, the plaintiff did agree to accept such lease, and to pay to the defendant 5200*l.*, the residue of the purchase money, on the execution of the said lease and the delivery to him thereof, and of the possession of the said messuage and premises as aforesaid: And it was further agreed, that if either of the parties should refuse or neglect to perform the agreement on his part, he should pay to the other of them who should be willing to complete the same, 1000*l.* as liquidated damages, and to be sued for accordingly. The declaration stated an enlargement of the term for executing the agreement from 24th to 29th June, and mutual promises. Averment: that although the plaintiff did on the said 15th June pay to the defendant 300*l.* by way of deposit, and although, on the said 29th June, the plaintiff was ready and willing, and offered to pay to the defendant 5200*l.*, being the residue of the purchase money, and to perform and fulfil the said agreement on his part, of which premises the defendant then had notice: Yet the defendant did not nor would on or before the said 29th June, or at any time afterwards, demise unto the plaintiff the premises in the said agreement mentioned, with the yards, outbuildings, and appurtenances thereto belonging, although requested by the plaintiff so to do; nor did nor would the defendant, although he was requested by the plaintiff so to do, deliver to the plaintiff the possession of said messuage and premises on or before the said 29th June, but on the contrary thereof the defendant then wholly neglected and refused, and still doth, &c. The count concluded by a statement of special damage, and claimed the sum of 1000*l.* according to the agreement, for non-performance by the defendant of the said agreement on his part. The declaration also contained counts for money had and received, and upon an account stated.

The defendant pleaded non assumpsit to the whole declaration, and several special pleas to the first count,—of which the following only need be inserted here.

Third plea: that at the time of making the agreement, and until and upon the said 29th June, 1835, the said messuage or public-house, with the yard and outbuildings thereunto annexed and belonging, were in the defendant's own occupation, and he was always ready and willing and able to demise the same to the plaintiff, and to give him the possession thereof, the said messuage and public-house, yard, and outbuildings, being the material parts of the tenement mentioned in and forming the subject of the agreement: And at the time of making the agreement there were five cottages and buildings of small and insignificant value and importance, and being a subordinate part of the tenements agreed to be demised to the plaintiff, and such cottages and buildings were respectively let by the defendant to divers persons, and were then occupied by them as his tenants, and the defendant could have caused the said tenants to quit the said cottages and buildings before the said 29th June, 1835, if the plaintiff had so desired; and of all which premises the plaintiff at the time of making the agreement, and before and on the said 29th June, had notice. Averment: that at and upon the making of the agreement in the declaration first mentioned, it was agreed by and between the plaintiff and defendant, that the defendant should not cause the tenants to quit the cottages, &c., but that on the defendant's completing the agreement the tenants should attorn to

the plaintiff and become his tenants of the respective cottages, &c.; (a) and that the plaintiff then and continually from thence, until and at the time for completing the contract, discharged the defendant for causing the tenants to quit the cottages, &c., and from giving the plaintiff actual possession thereof; and that by reason of the premises and not otherwise, the defendant accordingly abstained from causing the tenants to quit the cottages, &c., as he otherwise might and would have done, and refrained from placing himself in a situation to give the plaintiff actual possession of the cottages, &c., on the said 29th June: that before and on and after that day, the tenants would have attorned to the plaintiff, and become his tenants in regard to the cottages, &c., and which were let at reasonable and proper rents, all which the plaintiff then well knew; and further, that the plaintiff did not give the defendant notice that he should require, nor did he require, the defendant to give him possession of the cottages, &c., until a late and unreasonable hour of the night of the said 29th June, to wit, just before the hour of 12 o'clock of that night, when there were not reasonable or sufficient time or opportunity to cause the tenants to quit and give the plaintiff possession of the cottages, &c., and that the plaintiff wrongfully and fraudulently abstained from giving such notice and making such requisition until the time aforesaid. Further averment: that the defendant was, on the said 29th June, ready and willing and able, and offered to the plaintiff to demise to him all the said tenements and premises so to be demised to him, and to give to him the possession of the said tenements and premises, except the said cottages, &c., on the last-mentioned day; but that the plaintiff then, to wit, at such unseasonable and unreasonable hour of the last-mentioned day, wrongfully refused to pay the remainder of the purchase money or the said sum of 1000*l.*, or to accept such lease, unless the defendant would then instantly deliver to him the possession of the cottages, &c., and under that colour and pretence wrongfully refused to perform the agreement on the plaintiff's part, and prevented the defendant from completing the same on his part. Verification.

Replication to the third plea, that it was not agreed by and between the plaintiff and the defendant, that the defendant should not cause the tenants to quit the cottages, &c., in that plea mentioned, but that on the defendant's completing the said agreement, the tenants should attorn to him and become his tenants of the respective cottages, &c., nor did he, the plaintiff, discharge the defendant from causing the defendant to quit the said cottages, &c., and from giving the plaintiff actual possession thereof in manner and form, &c. Concluding to the country.

At the trial before Lord DENMAN, C. J., at the London sittings after last term, it appeared, that besides the "*Somers Town Coffee-house*," which formed the principal subject-matter of the sale, the property in question consisted of several cottages, rented by weekly tenants. The plaintiff was informed of these circumstances, but neither made any objection to the tenants being allowed to continue in possession as such weekly tenants, nor gave any intimation that he should require actual possession of the whole of the premises to be given up to him. Upon

(a) The demise of the messuage and cottages would have vested the immediate reversion of the cottages in the lessee, without any attornment since 4 Ann. c. 16, s. 9; and it would rather seem that even before that statute no attornment was necessary to the assignment of a reversion for years. See Dyer, 26 a, 58 a, 307 b, 350 a; Bendloes, pl. 286; Dalison, 89; 3 Leon. 17; Com. dig. title *Attornment* (L).

the night of the 29th June, between 11 and 12 o'clock, when the parties had met for the purpose of concluding the sale, and nothing but the valuation of a portion of the stock remained to precede the transfer of property, the plaintiff's attorney inquired, for the first time, of the defendant, whether he was in a situation to give up actual possession of the cottages. An answer in the negative being given, the plaintiff declined concluding the sale, and shortly afterwards commenced this action against the defendant for the alleged breach of agreement. Upon this state of facts his lordship directed the jury to consider whether they could infer, from the knowledge of the plaintiff that the cottages were tenanted, and his abstaining from making any objection on that ground until just before the expiration of the time within which the bargain was to be concluded, that he had assented to receive a constructive instead of an actual delivery of possession, by looking upon the occupation of the tenants as his own. Under this direction, the jury, being of opinion that the plaintiff's conduct amounted to a trick upon the defendant, found for the defendant upon the third issue.

Platt now moved for a rule nisi for a new trial, on the ground of misdirection. There was no evidence of a waiver by the plaintiff of that part of the agreement, by which he was to receive actual possession of the premises. [Lord DENMAN, C. J. I assumed that the plaintiff knew of the tenure of the cottages, and there was no requisition by him that possession of them should be given up until a quarter before twelve o'clock at night of the day on which the agreement was to be performed. That looked very much like keeping back the objection until it was impossible for the other party to get rid of it. If actual possession had been required before, the tenants might have been put out of the way by an agreement with them. I thought it was for the jury to consider whether the plaintiff had not assented to consider the possession of the tenants as his own.] This was a written agreement, and could not be varied by parol; *Goss v. Lord Nugent* 5 Barn. & Adol. 58. [Lord DENMAN, C. J. No objection was made at the time to receiving the evidence. I think you are too late with this objection.] It is submitted that there was no evidence of such an agreement. The mere silence of the plaintiff up to a quarter before twelve o'clock, was the only circumstance from which it could even be inferred. If parol evidence of such an agreement had been offered, its reception would have been objected to. And surely an *inference* from the conduct of a party cannot be more effectual than direct evidence. [Lord DENMAN, C. J. When I put it to the jury to consider whether the conduct of the party did not show that he had waived an actual delivery of possession, you should have raised the objection as to its reception, as being parol evidence.] There was no evidence at all of the waiver. There was a mere abstaining from demand until a quarter before twelve, which was consistent with an honest intention. The valuation and accounts were not settled till up to that moment. The jury said, that they considered the starting of that objection to be a *trick*. That idea was inconsistent with the supposition of there being an *agreement* to waive it.

Cur. adv. vult.

On a subsequent day in the term,
Lord DENMAN, C. J., after stating the pleadings and evidence, said,
—The first question raised upon moving for the new trial was, whether

there was evidence to support the view which both the jury and myself took at the trial; and we all think that there was such evidence.

Another question was, whether, under the decision in *Goss v. Lord Nugent*, the evidence was admissible, it being urged that it was evidence of a parol agreement, contradictory of a written agreement which had been entered into by the parties. This objection, it is to be observed, was not taken at the trial; but we are of opinion that this case does not fall within the principle established by *Goss v. Lord Nugent*. The evidence went merely to show the intention of the parties, at the time of entering into the agreement, that the delivery of possession of the cottages should be, not by delivering actual possession of the cottages, but by the plaintiff's considering the tenants of these cottages as his tenants from the time of completing the agreement.

Rule refused.

In the Matter of a Suit in the Consistory Court of Hereford, between
JOHN BODENHAM, ROBERT LEWIS, JOHN ADCOCK PHIL-
LIPS, and WILLIAM HAMAR, Plaintiffs,
and
THOMAS BOURKE RICKETTS, Esq., Defendant.—p. 170.

Notwithstanding 53 Geo. 3, c. 127, s. 7, the Ecclesiastical Courts have original jurisdiction to enforce the payment of a church rate under 10*l.*, where the validity of the rate is questioned by the party rated.

MARTIN v. BURGE.—p. 201.

A verdict for 3000*l.* damages, and 40*s.* costs, is taken by consent, subject to a reference of the cause and all matters in difference between the parties. An award directing the entering of a verdict for the plaintiff, and the payment of 260*l.* 12*s.* 6*d.* from the defendant to the plaintiff, but not expressly stating for what amount the verdict was to be entered, is bad for uncertainty.

A rule nisi to set aside an award, need not be moved for within the first four days of the term next after the publication of the award. (a)

By an order of nisi prius, which was afterwards made a rule of court, this cause and all matters in difference between the parties were referred to an arbitrator, a nominal verdict for 3000*l.* damages, and 40*s.* costs, having first been entered for the plaintiff. By the terms of the order, the arbitrator was empowered to direct that a verdict should be entered for the plaintiff or the defendant, as he should think proper, and to determine what was to be done by either of the parties respecting the matters in dispute. Each party was to pay his own costs of the cause and the reference, and a moiety of the arbitrator's charges.

The arbitrator made and published his award on the 9th December, 1835, by which he directed that a verdict should be entered for the plaintiff, and that the defendant should pay to the plaintiff the sum of 260*l.* 12*s.* 6*d.*

(a) Upon this point vide *Allenby v. Proudlock*, 4 Dowl. Prac. Ca. 54, in which case Coleridge, J., enters very fully into the principle and rules by which the time for moving to set aside an award is limited.

On a day subsequent to the fourth day of this term, the defendant obtained a rule nisi to set aside the award for uncertainty.

Platt and *Channell* now showed cause. The award is certain. The verdict is clearly to be for 260*l.* 12*s.* 6*d.*

The applicant not having moved for this rule within the first four days of the term next after his having notice of the award, he is bound to show a defect apparent on the face of the award itself. [LITTLEDALE, J. No such rule as that which has been alluded to existed until many years after I had been called to the bar. Afterwards, some sort of a rule to that effect was introduced; but the matter rests upon the general discretion of the Court.] *Rawsthorn v. Arnold*, 9 Dowl. & Ryl. 556, 6 Barn. & Cressw. 629, (13 E. C. L. R. 286;) acc. *Thompson v. Jennings*, 10 B. Moore, 110, (17 E. C. L. R. 137;) *Bennett v. Skardon*, 5 Mann. & Ryl. 10, (a) shows that where a *cause* is referred by order of nisi prius, a motion to set aside the award must be made within the time allowed for moving for a new trial; though where the defect is apparent upon the face of the award, a motion may be made to set aside a judgment founded upon such irregular award after that time has elapsed.

Ogle, contra. By the order of nisi prius, authority was given both over the verdict and over all matters in difference. The award, after reciting the order, directs that a verdict shall be entered for the plaintiff, without saying for what amount; and that the defendant shall pay to the plaintiff 260*l.* 12*s.* 6*d.* That sum must clearly be taken to have been awarded in respect of the other matters in difference, independent of those which formed the subject-matter of the cause.

LORD DENMAN, C. J.—I do not think that that is clear. If it be clear, then there can be no doubt that the award is not uncertain. The cause being called on for trial was referred, a verdict being taken by consent for the plaintiff for 3000*l.*, (the damages laid in the declaration,) subject to reduction by the arbitrator. Then the award says that a verdict *shall* be entered for the plaintiff, and that the defendant shall pay a certain sum to the plaintiff. It would seem as if the arbitrator meant to give the plaintiff both the amount of the verdict and a sum extra. The award appears to be uncertain.

LITTLEDALÉ, J.—The arbitrator was bound to state for what precise amount the verdict was to be entered. That is quite clear. It might indeed be said that it was his intention that it should be entered for 260*l.* 12*s.* 6*d.* But that is a mere conjecture.

The other Judges concurring.

Rule absolute.

(a) So in *Lyng v. Sutton*, E. 1836, the Court of C. P. discharged a rule for setting aside an award, on the ground that the rule had been moved for after the first four days of term.

CASES
 ARGUED AND DETERMINED
 IN THE
COURT OF KING'S BENCH,
 IN
Easter Term,
 IN THE
 Sixth Year of the Reign of William IV.—1836.

ALCOCK and others v. TAYLOR.—p. 296.

In *assumpsit* for demurrage upon an agreement in the nature of a charter-party, non-compliance by the plaintiffs with the provisions of 3 & 4 W. 4, c. 52, s. 108, requiring that previously to the unloading of goods carried coastwise, a written notice of the ship's arrival, with goods, signed by the master, shall be given to the collector or controller of customs, by the master, owner, wharfinger, or agent of such ship, and proper documents obtained, should be specially pleaded, and cannot be set up as a defence under non *assumpsit*.

MECHELEN v. WALLACE.—p. 316.

A. lets to B. a furnished house, at a certain rent payable in advance, from a certain future day, and agrees that it shall be furnished suitably for a school:—The suitable furnishing of the house is a condition precedent to the right to demand the rent.
 If B. enters, and the house is not so furnished, A. cannot distress for the rent.
 Whether a verbal representation that the house will be suitably furnished, forms part of the contract or not, is a question for the jury.

TRESPASS for breaking and entering the plaintiff's house and taking away his goods. Plea: first, not guilty; secondly, a distress for rent, under 11 Geo. 2, c. 19, s. 21. (a) At the trial before ALDERSON, B., at the Gloucester spring assizes, 1836, the following facts appeared:

The plaintiff being desirous of obtaining a house where his wife might keep a ladies' school, in the early part of May, 1835, entered into a treaty with Wood, the defendant's house-agent, to become the tenant of Laurel Lodge, furnished, at a rent of 170*l.* per annum, the tenancy to commence on the 25th of the month. The plaintiff having come to

(a) Which authorizes landlord, when sued in trespass for a distress, to plead the general issue and give the special matter in evidence, or to plead the defence specially.

Cheltenham an entire stranger, it was agreed that the rent should be paid in advance, by four equal quarterly payments. The tenancy of Laurel Lodge not being to commence till the 25th of May, the defendant accommodated the plaintiff in the mean time with the use of an adjoining house, which also belonged to her. The agent pledged himself that Laurel Lodge should be furnished in a manner to make it suitable for a ladies' school. On the 25th day of the month, the plaintiff took possession of the house, under the verbal contract above stated, and on the 26th a written agreement for a tenancy was tendered to him for execution, which however he refused to sign. On the same day he addressed a letter to Wood, in which he complained that that person, upon whose honour he had entirely relied in taking the house, had not performed his stipulations; that the house was indifferently furnished, and inadequately to the rent to be paid for it, and that he could not be expected to sign any agreement until the house was properly completed. The rent not being duly paid, in November following, the plaintiff distrained for 42*l.* 10*s.*, being the sum due for one quarter, and for this distress the present action was brought. The learned judge directed the jury to consider whether or not a rent certain had been fixed upon between the parties, telling them to find for the defendant, if they thought that the plaintiff took the house upon the terms of paying 170*l.* per annum, and was contented to rely upon Wood's honour for the proper furnishing of the house; for the plaintiff, if they were of opinion that the entry was but *provisional*, and that the amount of rent was to be determined afterwards, by reference to the quantity and quality of the furniture supplied. The jury having found for the plaintiff,

Tulfourd, Serjt., in pursuance of leave reserved, now moved for a new trial, on the ground, first, of misdirection; secondly, of the verdict being against evidence. The real question in this case is, whether the defendant, being the owner of the premises held by the plaintiff, had a right to distress for the amount of rent alleged to be due to her. That question depended upon the evidence of Wood, who negotiated the agreement between the parties.

On the 25th of May the plaintiff took possession of Laurel Lodge, and the first quarter's rent became payable immediately. The distress was taken for one quarter's rent only. To defeat the case set up by the defendant, it was contended by the plaintiff, that as the house was to be let furnished, and in a manner suitable for a ladies' school, the bargain was conditional, and that the condition not having been performed, no tenancy ensued. Complaints were made that the furniture was not of the description which the plaintiff was entitled to expect, and that even such as it was it was incomplete. The question therefore arose, whether the bargain was conditional, and if so, whether the furniture was incomplete, and of a description inferior to what the plaintiff had a right to expect. It was certainly stated by Wood, that the rent was to be 170*l.* for the house and *furniture*, and that the house was to be *completely furnished*, suitably for a school. But it is submitted that a failure of the defendant in a complete performance of her part of the agreement, furnished no answer to her right to distress. The plaintiff has already commenced an action against her for the non-performance of her stipulations. The evidence was clear that the tenancy was to commence on the 25th of May, and that the first quarter's rent became payable immediately upon that day. It is impossible to contend that

the furnishing of the house formed a condition precedent to the payment of rent. The plaintiff had declared that he relied upon the *honour* of Wood, that the house should be properly furnished. The learned judge at the trial was at first inclined to think that the plaintiff's case furnished no answer to the defence, and that it was the subject of an independent action only. The plaintiff's counsel then cited *Regnart v. Porter*, 7 Bingh. 451, 5 Moore & Pa. 370, (20 E. C. L. R. 194.) There a tenant entered under an agreement, containing stipulations for a lease at a fixed rent, and an engagement by the landlord to complete the house, and make it fit for habitation. The premises were never completed, and the tenant never paid any rent, but when called upon to do so said, that he was ready to pay what was due, provided the house were completed, according to the agreement, and an allowance made to him for the expense of some repairs. The Court held, that as the agreement itself did not constitute a tenancy, and there was no proof of an absolute and an unqualified promise to pay a rent certain, the landlord was not entitled to distrain. That case is distinguishable from the present. There the acts to be performed by the landlord constituted a *condition precedent* to the payment of rent; they were to be done previously in point of time. The distinction between the cases where the performance of a particular act is or is not to precede the enforcement of another, is clearly taken by Mr. Serjt. Williams, in his notes upon *Pordage v. Cole*, 1 Wms. Saund. 319. [Lord DENMAN, C. J. When do you say that the furniture ought to be put in?] Upon the commencement of the tenancy. The plaintiff was in possession on the day of commencing the tenancy. [Lord DENMAN, C. J. It is very improbable that the plaintiff should have made an absolute bargain for the payment of rent, whether the furniture were put in or not.] He trusted to the honour of Wood. [Lord DENMAN, C. J. That is the question, whether he trusted to Wood's *honour*, or made it a *condition precedent*. His letter to Wood only contained matter of reproach.]

PATTESON, J.—I do not see how you are to separate one part of the agreement from the other.

Et per Curiam—

Rule refused.

- LISTER v. LOBLEY and Others.—p. 340.

Where by a local act certain trustees are empowered to take and use lands, &c., for the purpose of making a road, "making or tendering satisfaction to the owners or proprietors of all private lands, &c., so taken and used, for the same or for any loss or damage they may sustain thereby,"—satisfaction must be made by the trustees, not to the owners of the inheritance only, but to all persons having any estate or interest in the land, who may sustain loss or damage by reason of the lands being taken and used.

TRESPASS quare clausum fregit. Plea: justifying under the trustees acting under 5 & 6 Will. 4, c. xxxvi., intituled "An Act for repairing and maintaining the Road from the Wellington-Bridge-Road, in the parish of Leeds, to Tong-Lane-End, in the parish of Birstale, and other Roads branching therefrom, and for making and maintaining a new Road from the aforesaid Road, at Swallow Hill, in the township of Wortley, to Padsey, all in the West Riding of the county of York," and alleging that satisfaction had been duly tendered to the owners and pro-

prietors of the soil of the locus in quo. The case was tried at the last Yorkshire assizes before Lord DENMAN, C. J.

By 5 & 6 Will. 4, c. xxxvi., s. 25, the trustees are authorized to make the new road mentioned in the title of the act, and they and all persons acting under their authority are for such purpose empowered to enter upon and take and use the lands, &c., in the line of road laid down in the map therein mentioned, and also to take and use or pull down and remove the houses, &c., mentioned in the schedule to the act, any law or statute to the contrary notwithstanding, "making or tendering satisfaction to the *owners or proprietors* of all private lands, houses, buildings, tenements, and premises so taken and used for the same, or for any loss or damage they may sustain thereby." The locus in quo was in the line of road laid down in the map, and was entered by the trustees for the purpose of making the new road mentioned in the act, compensation having been tendered by them to the *owner of the reversion* only, but no satisfaction having been made or tendered to the plaintiff, who held the property for a term. Under these circumstances, the plaintiff contended that the entry of the defendants during his term was a trespass, for which they were liable to be sued. The defendants, on the other hand, made two points: first, that the trustees had satisfied the requisitions of the act, by tendering compensation to the person in whom the reversion was vested, for that he alone was "the owner or proprietor" of the land; and, secondly, that the trustees or their agents could not be deemed *trespassers*, but that if they entered upon lands under the authority of the act, without first making or tendering the compensation thereby required, the parties interested in the land were left to their remedies under the statute. These objections were overruled by the lord chief justice, who, however, gave the defendants leave to move for a nonsuit, in case the Court should think the objections well founded. Verdict for the plaintiff.

Cresswell now moved for a nonsuit or a new trial. By the 25th section of the act, the trustees were authorized to take this land, "making or tendering satisfaction to the owner or proprietor." None can be said to be the *owner or proprietor of land*, but he that is the owner of the fee. It is usual in acts of parliament of this sort to add "or other persons interested therein," or words to that effect; but none such occurring in this instance, the trustees must pay the whole of the compensation money to the owner of the fee, and the remedy of persons having limited interests in the land must be against such owner in fee. [LITLEDAL, J. According to your argument, if the owner of the inheritance had let to another for a long term at a peppercorn rent, he would nevertheless be entitled to receive the whole compensation.] It certainly goes to that extent; but that extraordinary consequence follows from the omission of the words usually inserted to meet this case. [COLERIDGE, J. The words "or other person interested therein" are inserted in other parts of the act. By sect. 28, no houses, &c., except such as are mentioned in the schedule, are to be taken or used or pulled down by the trustees, without the consent in writing "of the owner or proprietor thereof, or other person interested therein."] That circumstance favours the present argument. [LITLEDAL, J. In an action for tithes under 2 & 3 Ed. 6, c. 13, the clergyman declares as *proprietor* of the tithes; yet he has no fee. Does not the word "*proprietor*" mean the person entitled for the time being? Does not the plaintiff, as a person having a present

short interest in the land, satisfy the term "proprietor?"] In the case of *tithes*, the parson may declare as proprietor of the tithes, for all that is claimed in such case is, that part of the produce of the land in the existing year which should have been set out as tithes for the incumbent. The proprietor of *land* must be the person to whom the fee belongs.

The motion was also made upon the second point taken at the trial.

LORD DENMAN, C. J.—This motion for a nonsuit is made upon two points. One question is, whether the plaintiff was an "owner or proprietor" of the land, so as to be entitled to receive compensation from the hands of the trustees. It appeared to me that a tenant is an owner or proprietor for such purpose. The words have not any definite legal meaning, but are words of popular import, and are so used. The owner of the fee, and the owner of a term in the land, are each of them *an* owner of the land. Certainly a strong argument arises from the fact that in other parts of the act a distinction is impliedly taken between "owners or proprietors" of the land, and "other persons interested therein;" but this argument, from analogy with other parts of an act of this sort, would not warrant us in saying that the owner of a term in the land, was not an "owner or proprietor" within the meaning of the 25th section. We should not satisfy the meaning of the words of that section unless we held that a termor is entitled to compensation "for any loss or damage which he may sustain," by reason of the land being taken by the trustees.

The second question had better be embodied in a case. Upon that point we grant a rule nisi, unless the plaintiff agrees to state a case.

LITTLEDALE, J.—The words of the 25th section embrace the present complainant. The words "owner or proprietor" are not legal terms, but words of common parlance. By "owner" is not necessarily meant a tenant in fee simple; but the word is commonly used to express, generally, a person who receives beneficial returns from the land. The tenant in fee simple may have scarcely any beneficial interest in the land. The same observations apply to the term "proprietor." Neither of the words has any necessary strict meaning. In the case of an action for tithes, the common form of declaring is to state that the plaintiff is *proprietor* of the tithes, and this allegation is satisfied by showing that the plaintiff has a lease of the tithes. Mr. *Cresswell* says, that in that case the plaintiff is only claiming a part of the produce of the land. So it may be; but still this shows that the word "proprietor" is used in different senses. Suppose a person grants a lease for 99 years, reserving no rent,—the *lessee* is in common parlance the *owner*. Any person who has a beneficial interest in the land is within the meaning of the words of this enactment. Those words are, "making or tendering *satisfaction* to the owners or proprietors of all private lands, &c., so taken and used *for the same, or for any loss or damage they may sustain thereby*," which clearly are not limited to the owner of the fee simple,—who may sustain no loss or damage whatever.

PATTESON, J.—I entertain no doubt that the words of the 25th section include tenants and all persons interested, who may sustain damage by reason of the land being taken and used for the purposes of this act. No sound argument arises from the words "owners or proprietors" being used in a different sense in other parts of the act. Contradictions and inconsistencies are invariably to be found in local acts. We must endeavour to collect the general meaning. If I could find any clause in

the act which gave to the tenant a right to sue the owner of the inheritance, there would be a strong argument in favour of the construction sought to be put upon these words. There is no such clause, and I believe that at law the tenant would have no remedy at all. We cannot say that the legislature intended to put the whole compensation into the pocket of the owner of the fee, when there is a lease for 99 years,—leaving no remedy to the tenant, who has almost the whole beneficial interest.

COLERIDGE, J.—I disclaim being influenced by any wish to avoid particular inconvenience in this case. We must ascertain what is the real meaning of the words. This is not a general act, but a local and private act, and therefore to be construed against the party obtaining it. Looking at the words accordingly, I think that any person having an estate or interest in the land, who is injured by reason of the land being taken or used for the purposes of the act, is entitled to compensation.

Upon the first point: Rule refused.

Upon the second point; Rule granted, unless a case be agreed upon.

The KING v. The Justices of OXFORDSHIRE.—p. 351. (a)

Held, per COLERIDGE, J., in the Outer Court, that under 4 & 5 W. 4, c. 76, s. 72, an application for an order on the putative father of a bastard child need not, in all cases, be made to the first sessions after the child becomes chargeable, but must be made to the first sessions at which it can be made with effect.

(a) The editors are indebted to Mr. Lumley for the report of this case.

JOHN SCOTT and two others, Executors of F. SCOTT, deceased, v. BRIANT.—p. 381.

In sci. fa. by executors to revive a judgment obtained by the testator, all who are named executors in the will may join, though one only have proved. Executors derive their title from the will, and not from the probate.

Sci. fa. to revive a judgment obtained by the testator against the defendant. The plaintiffs made profert of the probate in the usual form. (a) Plea: that the plaintiffs were not executors, &c., in manner and form, &c.; whereupon issue was joined. At the trial, it appeared that all the plaintiffs were appointed executors in and by the will, but that probate had been granted to John Scott alone, with a reservation of power to the others to come in and prove. *Mansel* contended, that inasmuch as probate had been granted to one of the plaintiffs only, the plea was sustained by the evidence. The learned judge by whom the cause was tried, thought that the plaintiffs were rightly joined, and that the issue ought to be found for them. Verdict for the plaintiffs. *Mansel*, in the following term, obtained a rule nisi to arrest the judgment, or for a nonsuit or new trial.

(a) In sci. fa. by executors, the profert of probate is very commonly but incongruously inserted in the writ. The profert should be made in the declaration, after the allegation of the defendant's appearance.

R. V. Richards now showed cause. In an action by executors, all who are named as such in the will must join, though some have not proved the will; *Brooks v. Stroud*, 1 Salkeld, 3, cited in 1 Wms. Saund. 291 i; *Walters v. Pfeil*, 1 Moody & Malkin, 362, and if they do not all join, the defendant may plead in abatement; 1 Wms. Saunders, 291 i; but where they are *sued* in their representative characters, it must be shown that they have all acted. The plaintiffs are all of them *executors* by the will, though one only has *proved*.

Munsel, *contrà*. As probate was granted to one alone, he was the proper person to sue; at all events it should have appeared from the profert that one only had proved, and that power was reserved to the others to come in and prove. [Lord DENMAN, C. J. In Com. Dig. *Pleader*, (2 D 1,) it is laid down absolutely, that in an action by executors all must join, though some do not prove the will, but refuse before the ordinary.] The plea being in this case, that the plaintiffs were not executors, they should have been prepared to show a complete title in all of them, which could only be by obtaining probate to all. These three persons jointly had no right to bring the probate into Court.

LORD DENMAN, C. J.—There is nothing at all in this argument. The question is exactly the same, although issue is taken upon the fact of their being executors. The question is, whether they are executors; and undoubtedly they are so.

LITTLEDALE, J.—The question is merely whether the plaintiffs are executors, as they describe themselves in the sci. fa. It appears to me that they are so. The will having gone into the Ecclesiastical Court, and having been there recognised by the granting of probate to one, all who are named in it as executors are acknowledged to be such. In Bro. Abr. *Executors*, pl. 27, there is this passage: "Debt by one executor. The defendant says that there is another executor alive, wherefore he prays judgment of the writ. The plaintiff says that he is discharged from the administration, and never administered. Nevertheless the writ was quashed, because he can administer when he pleases."

PATTESON, J.—Upon this issue the matter is quite clear. The fallacy of the argument consists in supposing that executors are made by the *probate*, whereas they are created by the *will*.

COLERIDGE, J., concurred.

Rule discharged.

ICELY v. GREW.—p. 467.

Where, in a contract of sale entered into at an auction, one of several conditions is, that if the purchaser shall fail to comply with any of the conditions, the deposit shall be forfeited as liquidated damages; such condition forms no *qualification* of the general promise to complete the purchase.

Therefore upon a wrongful abandonment of the contract, on the part of the purchaser, the vendor may recover damages ultra the forfeited deposit; and is not bound to state this condition in declaring upon the contract.

ASSUMPSIT. The declaration stated, that the lease of a shop, and the good-will belonging to it, had been exposed to auction for the plaintiff by a certain person, being his auctioneer and agent, upon the following (amongst other) conditions of sale, viz.:—That the highest bidder should be the purchaser; that the purchaser should pay immediately a deposit

of 20*l.* per cent. in part of the purchase, and sign an agreement for payment of the remainder on or before the 25th March, 1834; and, in case of further delay in the completion of the purchase, from any cause whatever, the purchaser should pay 5 per cent. interest until payment, or the vendor should be entitled to the rents, at his option, but without prejudice to the vendor's rights under the last condition; that an abstract of the vendor's title, commencing with the lease under which the premises were held, (a) should be delivered at his expense, and that upon payment of the purchase money the purchaser should have an assignment from the vendor, the expense whereof, and also the expense of all other things the purchaser might require, in deduction or confirmation of title, should be borne by such purchaser; that all outgoing would be cleared up to Christmas-day then last; that if any mistake should have been made in the description of the premises, or any error whatever should appear in the particulars, such mistake should not vitiate the sale, but a compensation (to be ascertained by arbitration) should be given: That the defendant was the highest bidder for, and became and was declared to be the purchaser of the premises, at the sum of 7*l.*; and that thereupon in consideration, &c., the defendant promised to perform and fulfil every thing in the said conditions of sale on his part, as such purchaser, to be performed and fulfilled; and although the defendant, in part performance of the conditions, did pay down 1*l.* 10*s.* as a deposit, and in part payment of the purchase money, and did sign an agreement for the payment of the remainder thereof, on or before the 25th March, 1834, pursuant to the conditions; and although the plaintiff did, at his expense, within a reasonable time, deliver to the defendant an abstract of his title to the premises, commencing as in the conditions mentioned; and although all outgoing in respect of the premises were duly cleared up to Christmas-day next preceding the sale; and although he the plaintiff, before and on the said 25th March, 1834, was always ready and willing to make, and did make appear to the defendant a good title, so as to enable him to assign the residue of the term in the premises to the defendant, and to execute proper assignments thereof to the defendant, and on the day and year last aforesaid offered to assign to the defendant, and to give him possession upon payment of the remainder of the purchase money; yet the defendant would not, on or before the said 25th March, 1834, on having such good title as aforesaid, or at any other time, pay to the plaintiff the remainder of the purchase money, or any part thereof, but wholly refused so to do, and wholly refused then or at any other time to complete the said purchase, or to accept the assignment of the said premises to him, or the possession thereof. By means whereof the plaintiff hath not only lost all benefit and advantage which he might and otherwise would have derived from the completion of the said purchase, but hath incurred great charges and expenses in and about the sale, and in and about preparing an abstract of his title to the premises, and otherwise in relation thereto, and has been obliged to shut up the premises, and has lost the good-will.

(a) But for this qualification the vendee would have been entitled to inspect the title of the lessor, in order to ascertain whether he had sufficient estate or power to create the term. See *Purvis v. Rayer*, 9 Price, 488, 520; *Deverell v. Lord Bolton*, 18 Ves. 508, 512; *Fildes v. Hooker*, 2 Meriv. 424; *Fane v. Spencer*, Ib. 430, n.; *Ogilvie v. Foljambe*, 3 Mer. 53; *Knatchbull v. Grueber*, Ib. 137; *Spratt v. Jeffery*, 5 Mann. & Ryl. 168, and 10 Barn. & Cress. 249; (21 E. C. L. R. 64;) *Souter v. Drake*, ante, vol. iii. 40; 5 Barn. & Adol. 992, (27 E. C. L. R. 250.)

Plea : non assumpsit.

At the trial before Lord DENMAN, C. J., at the London sittings after Michaelmas term, 1834, the facts stated in the declaration were proved, and the conditions of sale were put in. In addition to the conditions set out, there was (amongst others that were not material) the following:—"Lastly, If the purchaser shall neglect or fail to comply with any of the above conditions, the deposit shall be *forfeited, as liquidated damages*, to be retained by the vendors, who shall be at full liberty to rescind the contract, and resell the lot either by public or private sale, without the necessity of previously tendering a conveyance thereof to the defaulter; and the deficiency, if any, by the second sale, together with all charges attending the same, shall be made good by the defaulter." It was objected, that, under the above conditions of sale, the deposit of 20*l.* per cent. was to be retained by the vendor as liquidated damages, and in full satisfaction for a breach of the conditions by non-completion of the purchase; and that the last condition was a material qualification of the contract, and ought, therefore, to have been stated in the declaration. His lordship overruled the objections, and the plaintiff had a verdict, damages 8*l.* (a) In the following term, *Addison*, in pursuance of leave reserved, obtained a rule nisi to enter a verdict for the defendant or for a nonsuit.

(a) It does not appear whether, in assessing damages to this amount, the jury gave credit for the sum received as a deposit. But it would seem that upon the *entire* damages sustained by the vendor being ascertained, the purchaser would be entitled to have the amount of the deposit *recouped* from such entire damages; as otherwise, the vendor either would be twice recompensed for that part of the breach of contract which corresponded with a breach of the conditions, or would receive a positive *bonus* in that which the parties treated merely as a liquidated *indemnification*.

Where in an assise of rent it was pleaded and found that the demandant had disseised the tenant of the land, the value of the land, during the disseisin, was *recouped* out of the damages assessed for the arrears of the rent; 8 Ass. fo. 20, pl. 37.

So, where, after the death of the husband, a stranger entered by abatement (qu. by *disseisin*, as the *heir* appears not to have been entitled) and endowed the wife,—in an assise against the abator and the wife, by the feoffee of the husband, the demandant recovered two thirds and damages against the abator, but the wife retained her third, (which had been assigned to her without collusion,) and one third part of the damages was *recouped*. 12 Ass. fo. 35, pl. 20.

So in a case where the Prior of St. John of Jerusalem in England recovered in assise, the jury assessed no damages, because they found that the tenant had built and repaired. 14 Ass. fo. 41, pl. 12.

Where A. leased to B. for life, and afterwards disseised B., who brought an assise of novel disseisin against A., it was held that the rent which occurred during the disseisin ought to be *recouped* from the damages, but not that which had occurred before the disseisin. T. 9 E. 3, fo. 8, pl. 21; S. P. per Reeve arguendo, T. 4 H. 7, fo. 11.

So in assise, in the King's Bench, for house and land at Stepney, the jury found only 40*s.* damages because the houses were well sustained, and the land had been sown. P. 24 E. 3, fo. 49, pl. 35. (The finding of the jury assumed that the emblements would belong to the demandant. And as the Court acquiesced in the view taken by the jury, this case is cited by Lord Brooke as an authority to show that upon a judgment in assise the demandant is entitled to emblements. Emblements. pl. 11.)

Where, in an assise of land, the demandant recovered the land, but the tenant showed that he had a rent charge issuing out of the land, (or a right of common over it,) the value of such rent charge (or common) was *recouped* out of the damages to be recovered in the assise. Fitz. Abr. M. 3 H. 6, tit. *Damage*, pl. 18. And see *Sands v. Peckham*, M. 4 H. 7, fo. 14.

So in Dyer 26, it is said, "If a man disseise me of land, out of which a rent charge is issuing, which has been in arrear for several years, and the disseisor pay these arrears, if (1) the disseisee recover in assise, the rent paid by the disseisor shall be *recouped* in the damages. And see *Warner's Case*, M. 33 H. 6, fo. 4, pl. 23; *Coulter's Case*, 5 Co. Rep. 30 b, third resolution; *Ireland v. Coulter*, Cro. Eliz. 631.

So an executor *de suo tort*, if sued in trover by the rightful executor, cannot plead payment of

Sir *W. W. Follett* now showed cause, and contended, that the whole contract being broken, the plaintiff had a right to sue for general damages.

Addison, contra. This condition ought to have been stated in the declaration; it forms a material qualification of the contract, and therefore the omission to set it out creates a variance, which may be taken advantage of under non assumpsit, because the plaintiff fails to prove a contract such as that laid in the declaration. If the Court be of opinion that the condition forms a material qualification of the contract, the defendant is entitled to a nonsuit.

But it is submitted also, that the defendant is entitled to have the verdict entered for him. The effect of the condition is, in fact, to limit the damages for a breach of the contract, to the amount of the deposit paid. If a carrier gives notice that he will not be liable to a greater extent than 5*l.*, and a party seeing the notice employs the carrier to carry goods of greater value, the damages are, in case of a loss of the goods, limited to 5*l.*; *Clarke v. Gray*, 6 East, 564, 2 Smith, 622. [*PATTE-SON, J.* The breach stated in this declaration is not in terms a breach of any of the *conditions*: it is a breach of the *contract*. The object of this condition seems to be to secure the performance of the particular things specified in the other conditions.]—The whole contract arises from the party's being the highest bidder, upon those conditions. The highest bidder is, by the conditions, to be the purchaser. The breach stated is a breach of that condition.

LORD DENMAN, C. J.—It is not meant, by this condition, that the deposit shall be regarded as liquidated damages as against a party who breaks off altogether. It is intended to be so only in case of a breach of any of the particular conditions.

LITLEDALE.—I think that the plaintiff is entitled to sue the defendant for general damages.

Et per Curiam.

Rule discharged.

debts of the testator to the value of the goods converted; or that he has given the goods to creditors in satisfaction of their debts, inasmuch as against the rightful executor he has no authority as to do; yet he may have the benefit of these payments by way of *recouper*. *Whitehall v. Squire*, Carthew, 103. And see *Mounsfurd v. Gibson*, 4 East, 441, 1 Smith, 129; *Kist v. Atkinson*, 2 Camph. 63; *Bamford v. Harris*, 1 Stark. N. P. C. 343, (2 E. C. L. R. 419;) *Le Loir v. Bristol*, 4 Camph. 134.

Formerly there could be no deduction by way of *recouper* unless the subject-matter of *recouper* were found by the verdict. Bro. Abr. tit. *Damages*, pl. 7. And see *Ibid.* pl. 94, 96, 99. But in *Plevin v. Henshall*, 10 Bingh. 24; 3 Moore and Scott, 402, (25 E. C. L. R. 17.) 2 Dowl. P. C. 743, it was held by the Court of C. P. that where a verdict in trover has been obtained against a party, who has since been compelled to pay rent due from the plaintiff in respect of the premises where the goods were taken, the execution upon the judgment in trover may be limited to the excess of the verdict beyond the amount of rent paid, on an application in the nature of an *audita querela*.

CARTER and Another v. SMITH.—p. 480.

A deed of separation, in which, after reciting that differences subsisted between the husband and wife, and that they had agreed to live apart, and that the husband had agreed to give to trustees for the benefit of the wife a life annuity for her separate maintenance, it was witnessed, that in consideration of 10*l.* paid by each of the trustees to the husband, and of the covenant thereafter contained, the husband granted to the trustees a life annuity of 200*l.* for the benefit of the wife, and in which there were (amongst others) a covenant by the trustees to in Jemmy the husband from the debts of the wife, need not be enrolled under 53 Geo. 3, c. 141, s. 2.

DIMS v. ARDEN.—p. 494.

Where a lord of a manor bound by tenure to repair, has repaired a bridge, he may, in an action of assumpsit, recover contribution from a person who holds lands which were parcel of the demesne at any time whilst the manor was so charged, in proportion to the value of the lands so held.

A survey taken by commission from the Crown, when seised of a manor, is admissible evidence to show what were the demesne lands of the manor at that time.

CHARLES SCHOFIELD, and ELIZABETH, his Wife, Administratrix, &c., of LANE, deceased, v. CORBETT.—p. 527.

A debt from the testator cannot be set off in an action for money had and received to the use of the plaintiff as executor.

ASSUMPSIT. The declaration stated that the defendant was indebted to Charles Schofield, and Elizabeth, his wife, as administratrix (with the will annexed) of Thomas Lane, deceased, in 80*l.*, for money received by the defendant, for the use of the said Charles, and Elizabeth, his wife, as administratrix as aforesaid, and in 80*l.* for money found to be due from the defendant, to the said Charles, and Elizabeth, his wife, as administratrix as aforesaid, on an account stated between the said defendant, and Charles and Elizabeth, as administratrix as aforesaid: And that the defendant promised the said Charles and Elizabeth, as administratrix as aforesaid, to pay them, &c.

Plea; first, non assumpsit; secondly, a set-off of a debt due from the testator, Thomas Lane, in his life-time.

Special demurrer to the second plea, stating for cause that it appears from the said declaration that the plaintiffs seek to recover in this action moneys accruing due to them the said Charles, and Elizabeth, his wife, as administratrix as aforesaid, after the death of the said Thomas Lane, and found the said action on the breaches of promise in that behalf made to them the said Charles, and Elizabeth, his wife, as administratrix as aforesaid, after the death of the said Thomas Lane; and yet the defendant hath in and by his last plea attempted to set off against such moneys, and damages, and causes of action, alleged debts stated to have been contracted by the said Thomas Lane in his life-time, and which cannot be set off against the moneys, damages, and causes of action mentioned in the declaration. Joinder in demurrer.

Ball, in support of the demurrer, referred to *Shipman v. Thompson*, Willes, 103; *Kilvington v. Stevenson*, Willes, 264, in notis; *Tegetmeyer and another, executors, v. Lumley*, Willes, 264, in notis, and was stopped by Lord DENMAN, C. J., who asked Sir *William Follett* if he could get over these authorities.

Sir *W. W. Follett*, in support of the plea. This is an action for money had and received, which may have belonged to the testator in his life-time, and is therefore distinguishable from *Kilvington v. Stevenson*, which was an action by an executor for goods sold by him after the death of the testator, there being in that case an immediate contract with the executor himself; and from the case of *Tegetmeyer v. Lumley*, which was covenant for rent accrued due after the testator's death,

[PATTESON, J. The words of the act of parliament, 2 Geo. 2, c. 22, s. 13, are, "where there are mutual debts between the plaintiff and defendant, or, if either party sue or be sued as executor or administrator, where there are *mutual debts between the testator or intestate and either party*, one debt may be set against the other," &c. Here the debt claimed does not appear to be a debt due to the testator. The administratrix here says that the defendant has had and received money to her use. Lord DENMAN, C. J. There was no debt due from the defendant to the intestate, as far as we know from this record.] It must be taken that the plaintiffs were bound to sue in their representative character; and a debt due to them in that character only, must, it is submitted, come within the meaning of the enactment. The money recovered would be assets in the hands of the plaintiffs. [PATTESON, J. In that respect the case does not differ from *Shipman v. Thompson*.]

Et per Curiam.

Judgment for the plaintiff. (a)

(a) And see *Whitaker v. Rush*, Ambler, 407; *Harvey v. Wood*, 5 Madd. 459; *Gale v. Luttrell*, 1 Younge & Jerv. 180; *Tucker v. Tucker*, ante, vol. i. 477, 4 Barn. & Adol. 745, (24 E. C. L. R. 151); *Borough v. Moss*, 5 Mann. & Ryl. 296; *Duckworth v. Alston*, 1 Mees. & Welsby, 411; *Braithwaite v. Colman*, ante, vol. iv. 654; *Mee v. Tomlinson*, ante, vol. v. 624. As to the form of pleading, see *Gibson v. Gilson v. Bell*, 2 Scott, 721, 1 Hodges, 136; *Duncan v. Grunt*, 1 Crompt. M. & R. 383, 4 Tyrwh. 818, 2 Dowl. P. C. 683; *Cousins v. Paddon*, 2 Crompt. M. & R. 547, 5 Tyrwh. 535, 4 Dowl. P. C. 488, 1 Gale, 305; *Graham v. Partridge*, 1 Mees. & Welsb. 395.

As to the law of set-off in cases of bankruptcy, see *Marsh v. Chambers*, 2 Stra. 1234; *Ridout v. Brough*, Cowp. 133; *Dickson v. Evans*, 6 T. R. 57; *Thomason v. Frere*, 10 East, 424; *Belcher v. Lloyd*, 10 Bingh. 310, (25 E. C. L. R. 145,) 3 Moore & Scott, 822; *Croom v. Meuley*, 2 Bingh. N. C. 138, (29 E. C. L. R. 285.)

The KING v. The Inhabitants of OLDLAND.—p. 529.

A poor person legally settled in the parish of A., who having come into the parish of B. *animo morandi*, there meets with an accident, such as to make it dangerous actually to remove him, or even to take him before a justice to be examined as to his settlement, and becomes chargeable in consequence thereof, cannot be regarded as *casual poor*; and an order for his removal may be made and suspended under 35 Geo. 3, c. 101, s. 1 & 2.

And such order being so made and suspended, the parish of A. is bound to pay to the officers of the parish of B. expenses incurred by them in curing and maintaining the pauper during the suspension of the order of removal.

But if such poor person had not come into the parish of B., *animo morandi*, he would have come within the description of *casual poor*, and would not have been removable.

So, if the poor person (e. g. a foreigner) had no settlement elsewhere. *Semble*.

CASES
 ARGUED AND DETERMINED
 IN THE
COURT OF KING'S BENCH,
 IN
Trinity Term,
 IN THE
 Sixth Year of the Reign of William IV.—1836.

The KING v. The Inhabitants of WISTOW.—p. 567.

A corn rent given by an act for inclosing lands and extinguishing tithes to the rector in lieu of tithes, is rateable to the relief of the poor, unless there be an express clause of exemption. Where, therefore, a commissioner appointed under such an act is directed to ascertain the yearly value of all the tithes, moduses, &c., and in making such valuation, the tithes of all lands are "to be deemed equal in value to one-fifth part of the annual *net* value of such lands," and a corn rent equal to the value of the tithes is to be settled and charged in due proportions upon the lands, and to be payable to the rector by the occupiers of the lands. The rector is liable to be rated in respect of such corn rent.

LAKE v. RUFFLE.—p. 684.

To a plea of coverture in the plaintiff, she cannot reply that at the time of the promise declared on her husband had been absent seven years, and that during that period he was not known, nor is he now known, by the plaintiff to be alive.

ASSUMPSIT by payee against maker of a promissory note. Plea. that the plaintiff, at the time of the making of the note, was and still is the wife of one Simon Lake. Replication: that the said Simon Lake, in that plea mentioned, had been and was continually absent from the plaintiff for the space of seven years next before the making and delivery of the note and the making of the defendant's promise, and had not been and was not known by the plaintiff to be living within that time; and that the said Simon, at the time of making and delivering the note and making the promise, was, and from thence continually hitherto has been, and still is absent from the plaintiff, and has not been known by the plaintiff to be living within that time, and is not now known by her to be living: Verification.

Special demurrer, for the following causes: that the plaintiff, instead of pleading that her husband is *dead*, pleads circumstances from which she wishes a legal presumption of that death to be raised, and so the replication is argumentative; and that in pleading the circumstances,

the plaintiff has pleaded them insufficiently for the purpose, by reason that she only states her own want of knowledge of her husband's being alive, and not that there was such want of knowledge generally.

Joinder in demurrer.

G. T. White appeared in support of the demurrer; but the Court called upon

Espinasse, *contra*. The replication is good. It states facts, the legal inference from which is, that the plaintiff, at the time of the making of the promise, was no longer covert. (*a*)

Lord DENMAN, C. J.—There is no ground for saying that it is a good answer, in point of law, to the plea of the coverture, that the husband has been absent and not heard of for seven years. This replication states the *evidence*, from which an answer, in fact, is sought to be inferred.

Et per Curiam.—

Judgment for the defendant.

(*a*) *Quære*, whether the facts stated lead to any other inference than that the plaintiff may have been punishable for remarrying.

The Reverend VERE JOHN ALSTON, Clerk, v. BENJAMIN ATLAY.—p. 686.

The sale of the advowson of a church which is full, is not simoniacal by reason of the incumbency being at the time of sale *voidable* at the election of the patron.

And a conveyance under such sale will pass the right of immediate presentation.

PAINTER v. The LIVERPOOL NEW GAS AND COKE COMPANY.—p. 736.

An act, incorporating a gas company, enacts, that in case any party who shall contract with the Company for gas, shall neglect, after ten days after demand made, to pay the gas rents, such rents may be recovered by the Company by warrant under the hand and seal of a justice of the peace, and that it shall be lawful for the Company, with such warrant, to levy the sums so due and owing as aforesaid by distress and sale.

Held,—first, that the granting of the warrant was a judicial, and not merely a ministerial act; and that therefore a magistrate could not issue a warrant without a previous summons.

Secondly, that although an officer executing such a warrant might justify under it, yet that the Company who procured the warrant, and interfered in the execution of it, could not.

Semble, that in no case can a magistrate issue a warrant of distress in the nature of an execution, without previously summoning the party whose goods are to be distrained, in order that he may have an opportunity of being heard.

Semble, that the 22 Geo. 2, c. 223, s. 1,—which enacts, that in all cases where any justice of the peace shall be required, by any act of parliament, to issue a warrant of distress for levying any penalty or sum, the justice may by such warrant order the goods so to be distrained to be sold within a time therein limited, so as such time be not less than four or more than eight days,—applies only where the granting of the warrant is a *judicial* act.

TROVER for certain coaches, harness, and horses. Plea, that after the passing of an act of parliament, made 4 Geo. 4, for lighting with oil gas the town of Liverpool, and certain places adjacent thereto, (*a*) the

(*a*) The 71st section of this act was as follows:—"That in case any party or parties, who shall contract with the Company, or agree to take, use, or enjoy the benefit of the said gas, shall refuse or neglect, after the space of ten days after demand made, or left in writing at the place or places of abode, or business of such party or parties, to pay the rents or sum or sums of money then due for such gas to the Company, it shall be lawful for the Company to cause the pipe or pipes furnishing such gas, and communicating with any main or mains, pipe or pipes, or other works, and whether such pipe or pipes shall be the property of the Company or otherwise, to be cut off, or in any other manner separated from the main or mains, pipe or pipes, or

plaintiff was indebted to the defendants in 12*l.* 18*s.* for gas supplied by the defendants to the plaintiff; that one W. H. Parkinson, being a collector of and acting under the authority of the defendants, left a demand in writing at the place of business of the plaintiff, and required him to pay to the defendants 12*l.* 18*s.*; that more than ten days afterwards, Parkinson preferred a complaint against the plaintiff for the premises aforesaid, before J. A.; then being one of His Majesty's justices of the peace for the county of Lancaster, who thereupon made a warrant under his hand and seal, directed to the sub-bailiffs, head constables, and assistant constables in and for the borough of Liverpool, and also to the said William Henry Parkinson and John Hampson, and their assistants, and thereby then authorized and commanded them, every or any of them, that upon the goods and chattels of the said plaintiff they should levy the sum of 12*l.* 18*s.*; for that he being a person who had contracted with the defendants to take the benefit of the gas from the defendants, did refuse and neglect, after the demand left in writing at the place of business of the plaintiff, to wit, on the 11th day of November, A. D. 1834, to pay the sum of 12*l.* 18*s.*, being the rent due to the defendants from the plaintiff, for gas consumed by the plaintiff; contrary to the form of the statute in such case made and provided, whereof the plaintiff was duly convicted, and for levying thereof they were to seize, take, and carry away the said goods and chattels; and if in five days after such seizure, the said sum of 12*l.* 18*s.*, together with the reasonable charges of taking and keeping the same goods and chattels, should not be paid, then (after the expiration of the said five days) they were to make sale thereof, or of so much thereof as should be sufficient to levy the said sum of 12*l.* 18*s.*, and after the levying thereof, if any overplus should remain of the said goods and chattels, or of the money arising by sale thereof, they were to render such overplus to the plaintiff, the reasonable charges of taking, keeping and selling the said goods and chattels, being out of the said overplus money first deducted; but in case sufficient distress could not be found, then and in such case they, by a return to the said warrant, were forthwith to certify the same to the said justice; and that Parkinson, acting under the authority of the defendants, did seize, take, and carry away, under and by virtue of the warrant, the goods and chattels mentioned in the declaration, and afterwards sold the same.

works with which the same shall communicate, and to cause such gas to be stopped from running or issuing through the same, and that the rent or rents, sum or sums of money then due from any such party or parties to the Company for such gas, as also any other rent or rents, sum or sums of money due and owing to the Company for gas supplied by them to any person or persons, shall and may be recovered by the Company or their clerk, or superintendent, or any person or persons acting under their authority, by warrant under the hand and seal of any justice of the peace for the town of Liverpool or county of Lancaster, (as the case may require;) and it shall be lawful for the Company, or their clerk or superintendent, or any person or persons acting under their authority, with such warrant to levy the said sum or sums so due and owing as aforesaid, by distress and sale of the goods and chattels of the party or parties so neglecting or refusing to pay the same, rendering the overplus (if any) to such party or parties, after deducting the necessary charges of such distress and sale, or the same may be recovered in the Borough Court of Liverpool, or in any of His Majesty's Courts of Record in England.

"That any body or bodies corporate or collegiate, or any other person or persons whatsoever, thinking himself, herself, or themselves aggrieved by any rule, bye-law, or order of the Company, or any thing done in pursuance thereof, or by the order or determination of any justice or justices of the peace, in pursuance of this act, may, within four calendar months after the cause of complaint shall have arisen, appeal to the justices of the peace at the General Quarter Sessions of the Peace to be held in and for the said borough or county."

Replication, that the plaintiff was not at any time, before the said J. A. made the said warrant, summoned or warned to answer the said complaint of Parkinson for the said supposed debt, before J. A. or any other of His Majesty's justices of the peace; nor did he before then have notice of such complaint, nor did he appear before the said J. A. or any other of His Majesty's justices of the peace, or any officer or person whatever, authorized or empowered to hear the said complaint to answer the said complaint.

Rejoinder, that the gas so supplied by the defendants to the plaintiff was supplied subsequently to the passing of the said act of 4 Geo. 4.

Demurrer, and joinder in demurrer. (a)

Wightman, in support of the demurrer. The plaintiff ought to have been summoned before a warrant was issued. In all cases where a statute is contravened, the offender should be summoned before he is convicted; *Rex v. Justices of Stafford*, (31 E. C. L. R. 203.) The 71st section of the act gives the Company power to recover the rent due for gas by this summary proceeding before a magistrate, and also by action. If the Company had adopted the latter course, the party would have had an opportunity of pleading any matter of excuse he might have for not complying with the demand. The legislature obviously intended that the party should have the same opportunity of being heard, whatever mode of proceeding the Company adopted. The party may have had a sufficient answer to the demand. [LITLEDAL, J. He may have paid the money, or none may have been due, yet he has had no opportunity of being heard. PATTESON, J. By the 73d section, an appeal is given against the order and determination of the justices. If there is to be a determination the party should be heard. (b) If the order is a ministerial act, there is no appeal against it.] This act does not give greater power than 43 Eliz. c. 2. The fourth section of that act provides, that the overseers may levy "as well the said sums of money and all arrearages of every one that shall refuse to contribute according as they shall be assessed, by distress and sale of the offender's goods." It has been decided, that before a distress warrant is issued under this statute, the party must be *summoned*. [LORD DENMAN, C. J. The words in this statute are different from those in the 43 Eliz. You can therefore only resort to the general principle.] In *Rex v. Benn*, 6 T. R. 198, Lord KENYON laid down this general rule: "A summons must precede a warrant of distress, which is in the nature of an *execution*. On the summons the party may show a sufficient reason to the magistrates why a warrant of distress should not issue; as, for instance, that he has already paid the assessment to one of the parish officers, who has not accounted for it. But it is an invariable maxim of our law, that no man shall be punished before he has an opportunity of being heard; whereas if a warrant of distress were to be issued

(a) The note of the point to be argued was as follows:—The main point for argument in this case is, whether or not, before granting the warrant set forth in the pleadings, the plaintiff ought not to have been summoned or warned to appear before the magistrate to answer the complaint, or to have appeared before him. The plaintiff contends that he ought to have been, and that therefore the warrant and proceedings under it were illegal. The defendants contend that they demanded the rent pursuant to the 71st section of the 4 Geo. 4, and that their proceedings were regular without any summons, no summons being required by the act or otherwise, and that as all events no action is maintainable under these circumstances.

(b) Vide *Cox v. Cokeridge*, 1 Barn. & Cress. 37; 2 Dowl. & Ry. 86, (8 E. C. L. R. 20;) *Rex v. Whately*, 4 Man. & Ry. 437 n., 438 n.; *Daubney v. Cooper*, 10 Barn. & Cress. 237 5 Man. & Ry. 314, (21 E. C. L. R. 64.)

without any previous summons, the party would have no opportunity of showing cause why the execution should not be awarded against him. (a) [PATTESON, J. Several penalties are imposed by the act, recoverable by summary conviction. Accordingly it must be contended on the other side that every one of those penalties may be recovered by a warrant without a summons.] The argument on the part of the defendants will be, that because the act does not *in terms* require a summons to be issued, therefore it is not necessary. [LITLEDALE, J. Under the Malicious Trespass Act, (7 & 8 Geo. 4, c. 30, s. 24.) there may, in one case, be a warrant without a summons, but that is in the nature of a criminal proceeding.

Cowling, (with whom was *Ogle*), *contra*. The argument in support of the demurrer amounts to this,—that a summons must in all cases be taken out before a distress warrant can issue, unless the statute expressly directs the contrary; and, secondly, that the subsequent proceedings are altogether void.

Assuming for the present that a summons ought to have issued, the warrant was not void, but only erroneous, as the magistrate had jurisdiction, and a party would be justified in acting under the warrant. This is laid down in the *Marshalsea Case*, 10 Co. Rep. 68 b, and in *Webb v. Batchelour*, 1 Vent. 273, S. C. Freeman, 396, 447, 488. In the latter case, a distress warrant had issued under 22 Car. 2, c. 12, for a sum of money for not repairing the highway. By that statute justices are authorized on complaint, if the party charged have no reasonable excuse, to issue their warrant, so that by the express words of the statute it was necessary to issue a summons, yet the Court held, that although no summons had been issued, the party was justified in acting under the warrant. It has been suggested, that if the party had been summoned, he might have given some excuse or reason why he had not satisfied the demand. It is not to be assumed that he had any excuse, but that suggestion may be answered in the words of HALE, C. J., in *Webb v. Batchelour*. "You might have gone to the justice, though, after the distress, before it was sold, if you had any excuse." In the present case, four days intervened between the distress and the sale, and this was done in pursuance of the 27 Geo. 2, c. 20. (b) In that interval,

(a) No action lies upon the judgment of a colonial court, if the defendant was never served with process, and had no opportunity of defending the suit; notwithstanding that, by the practice of such court, plaintiffs are authorized to proceed upon a return of "service, by nailing a copy of the declaration to the court-house-door." *Buchanan v. Runker*, 1 Campb. 63. So, to entitle a defendant to avail himself of a payment made by him, as garnishee in a foreign attachment in a colonial court, it must be shown that the now plaintiff was *summoned* to appear in the court, or at least that he once resided within the jurisdiction. *Cavan v. Stewart*, 1 Stark. N. P. C. 525. And see *Ryan v. Simpson*, 10 Mod. 345; *Rez v. Hale*, 6 Dowl. & Ry. 84; *Rez v. Cummins*, 8 Dowl. & Ry. 344; *Fisher v. Lane*, 3 Wils. 297, and 2 W. Bla. 834; *McDaniel v. Hughes*, 3 East, 367. But if a summons be awarded against the defendant, a return of non est inventus et nihil habet, is sufficient ground to support a foreign attachment, and it is not necessary that the defendant should be actually summoned. See *Harrington v. Macmorris*, 5 Taunt. 228, (1 E. C. L. R. 88;) and see *Turbill's Case*, 1 Wms. Saund. 67 n.

(b) Which, after reciting that by many acts of parliament justices of the peace are empowered to issue warrants for the distress and sale of goods and chattels, but the charges of distraining, keeping, and sale of such goods and chattels are not provided for in all the said acts, nor is there a time in all cases limited for the sale thereof, whereby inconveniences have arisen; for remedy thereof, enacts, "That in all cases where any justice or justices of the peace is or are, or shall be required or empowered, by any act or acts now in force, or hereafter to be made, to issue a warrant of distress for the levying of any penalty inflicted, or any sum of money directed to be paid by or in consequence of such act or acts, it shall be lawful for the justice or justices, granting such warrant therein, to order and direct the goods and chattels so to be distrained, to be sold and

the party might apply to the justice. [LITTLEDALE, J. How could the justice have relieved the plaintiff, if he had applied to him?] He might have ordered a restoration of the goods. The plaintiff has in truth sustained no injury, as it must be taken that he owed the money. Even if he has sustained an injury, he has mistaken his remedy. His proper remedy was an action *on the case* against the Company, for causing a warrant to be issued without a previous summons. Where a conviction has been obtained without the issuing of a summons, this Court will set it aside, and they will not compel magistrates by mandamus to issue a warrant without first issuing a summons; but if a warrant has actually issued without a summons, the party executing it is not a trespasser. In *Regina v. Dyer*, 6 Mod. 41, POWELL, J., said, "That if an action were brought against an officer in execution of this conviction, it would not lie; for an *erroneous* conviction would justify him." In *Ackerley v. Parkinson*, 3 Maule & Selw. 411, the judge had jurisdiction over the subject-matter, but the process issued against the plaintiff was void. It was held that the party acting bona fide under the warrant was justified. [PATTESON, J. This is not an action against the party *executing* the warrant, but it is against the Company, who procured the warrant.] The only conversion in this case was the *sale*, and that was made under the warrant.

The magistrates were not bound to issue a summons before granting their warrant. This Court will not grant a mandamus to compel magistrates to issue a warrant without having previously issued a summons; but the cases on this subject go no further than that. A distinction has already been pointed out between the cases on 43 Eliz. c. 2, and those on the present act. Under the latter the magistrates act only ministerially, like commissioners of bankrupt. The intention of the legislature was, that the Company should have the same remedy by distress against the consumers of their gas, as a landlord has against his tenant. The hardship is not greater in that case than in this. In the very section which gives the power of applying for a warrant, the word "rent" is used. In all probability the legislature required that an application should be made to a justice of the peace for a warrant of distress, rather than that the Company themselves should distrain without a warrant, to avoid breaches of the peace. It is said that the warrant might be issued after the party had paid; but so it may also be said that a landlord might distrain for rent after it had been paid. If the landlord did so, the tenant would have his remedy by action, and in the present case the consumer may maintain an action if the Company improperly obtain a warrant. [PATTESON, J. The warrant has given five days for payment.] That is by reason of the stat. 27 Geo. 2. c. 20. [PATTESON, J. That statute does not apply where the magistrate merely acts ministerially. The local act does not limit any time. The magistrate therefore exercises his discretion in this respect against the parties obtaining the warrant. Can it be said that the magistrate acts *ministerially*, when throughout he appears to act *judicially*?] If the justice acted judicially, the want of a summons is merely an error, and the party executing the warrant is justified. If the justice acted ministe-

disposed of within a certain time to be limited in such warrant, so as such time be not less than four days, or more than eight days, unless the penalty, or sum of money for which such distress shall be made, together with the reasonable charges of taking and keeping such distress, be sooner paid."

rially, he was not bound to summon. If an inferior court having jurisdiction proceeds *inverso ordine*, and issues a *capias* before issuing summons, the proceeding is not void, but only erroneous, and no action can be maintained for false imprisonment against the party acting under the *capias*.

Wightman, in reply. The warrant in this case is bad on the face of it, and shows an excess of jurisdiction. Even as to officers executing a warrant, if it be bad on the face of it, they are liable to an action; *Groom v. Forrester*, 5 Maule & Selw. 514. If a plaintiff causes a void process to be issued, under which a party is arrested, he is liable to an action for false imprisonment; *Parsons v. Lloyd*, 3 W. Bla. 845. The defendants in this case are not the persons *executing* a warrant, but they are the persons *procuring* it. [PATTESON, J. Was the summons set out in the warrant in *Webb v. Batchelour*?] The remedy given to the Company in such a case as this, is said to be like that which a landlord has against his tenant for rent; but the remedy in this case is more summary, because the distress may be instantly sold; and this distress, being in the nature of an execution, would not be replevisable.

Cowling. It does not appear that any summons was mentioned in the warrant in *Webb v. Batchelour*, but if there had been it is immaterial, for it is said by LAWRENCE, J., in *Welch v. Nash*, 8 East, 403, "that the justices cannot give themselves jurisdiction in a particular case, by finding that as a fact which is not the fact."

LORD DENMAN, C. J.—The first question is, whether the warrant, as set out in the plea, is so far good as to justify any person who acted under it. It is supposed to be a good warrant under the provisions of the 71st section of the local act, and on this point it becomes necessary for us to consider, on general principles, whether magistrates, authorized by statute to grant a warrant, by way of execution, may issue that warrant without previously summoning the party against whom the process is awarded. This has not yet been decided in any case, for although LORD KENYON gives an opinion upon it in *Rex v. Benn*, 6 T. R. 198, yet it was not necessary to the decision in that case. Considering the subject of the warrant in the present case, I am of opinion that no warrant ought to have been issued until the party had been summoned. The warrant states that the plaintiff is *convicted* of having contracted with the defendants for a supply of gas from them, and of having refused, after demand made in writing, to pay the rent due to them for gas consumed by him. The act authorizes the issuing of a warrant, if the party should refuse or neglect to pay. The terms of the act and of the warrant, referring, as it does, to a conviction, make it evident that the party ought to have been summoned, that he might have an opportunity of showing that nothing was due, or that he had not refused to pay, or that he had an excuse for not paying. We are called upon by general principles to declare that this warrant is illegal, because the party had not an opportunity of showing why he ought not to be convicted. It is certainly quite possible that a warrant may be illegal, and yet that a party may be justified in executing it. A warrant is a justification to officers, because they are not the judges of the legality of the process which they are called upon to execute. On this principle, acts of parliament have been very properly passed for their protection. It would be absurd that an officer required to execute a warrant, should have to consider whether or not it was *regularly*

issued. But that excuse does not apply in this case. This is not the case of a constable who has acted under a warrant, and pleads it as a justification. It is not the clerk of the Company, but the Company themselves, who justify under the warrant; for the plea states that Parkinson, the clerk of the Company, acting under their authority and by their command, took the goods by virtue of the warrant. We are therefore forced to consider, not whether the officer, but whether the party, who has set the whole proceeding in motion, is justified under the warrant. *Webb v. Batchelour*, 1 Vent. 273, does not apply. That case merely decides that an officer is not liable to an action for executing a warrant which is irregular. *Gwinne v. Poole*, 2 Lutwyche, 935, 1560, is the same in principle. The officer in such a case is justified, for otherwise, as was observed by HALE, C. J., in *Webb v. Batchelour*, and which observation POWELL, J., alludes to in *Gwinne v. Poole*, it would be making the constable more knowing than the justice. If a third party chooses, for his own benefit and advantage, to interfere and take upon himself to execute a writ, he must take care and see that it is a valid process. The defendants in this case have caused a warrant to be issued, and they have taken upon themselves to interfere in the execution of that warrant. They have failed to make out that the warrant is legal, and therefore there must be judgment against them.

LITTLEDALE, J.—I am of opinion that in point of law, in this case, a summons was necessary before the issuing of a warrant. This case is like *Rex v. Benn*, which was decided upon the statute of Elizabeth. The words of that statute are, “that the overseers, by warrant, may levy the arrears of every one who shall refuse to contribute according as they shall be assessed.” It may perhaps be urged that that decision is not applicable, because here the act says nothing about a refusal to pay. But in the latter part of the 71st section, it is said that the Company may with such warrant levy the said sums of money by distress and sale of the goods and chattels of the party or parties so neglecting or refusing to pay the same. I alluded, in the course of the argument, to the proceeding under the Malicious Trespass Act, (7 & 8 Geo. 3, c. 30 :) that may, however, be considered in the nature of a criminal proceeding, and as a proceeding to bring a party before a justice. But here, if no summons is issued, the party has no opportunity of going before a justice. When a demand is made, the party can apply only to the Company, for at that time no summons is issued. On the authority of *Rex v. Benn*, 6 T. R. 198, and upon the principles of common justice, a party ought not to be convicted and subjected to process of execution without an opportunity of being heard. So far, therefore, as relates to the legality of the warrant, I am of opinion that it is invalid, because no summons was previously issued. Then the question arises, whether, although the warrant is illegal, the defendants are justified under it. All that *Webb v. Batchelour*, 1 Vent. 273, decided was, that an action would not lie against an officer who acted under an irregular warrant. This is an action not against an officer, but against the Company. Let us see what the Company have done. Parkinson, their clerk, is at their instance put in motion to make a demand on the plaintiff. Parkinson makes an application on the part of the Company to a magistrate for a warrant; he obtains the warrant, seizes the goods of the plaintiff, and sells them for the benefit of the Company. They do not justify Parkinson’s act as the act of an officer executing the warrant

out of their clerk, acting under their authority. They adopt the warrant and identify themselves with Parkinson throughout the transaction. It was their duty to see that the warrant was legal, and, as it was not, there must be judgment for the plaintiff.

PATTERSON, J.—The first question is whether this warrant is bad upon the face of it. I do not entertain the least doubt that it is. The question arises upon this local act of parliament. It is sufficient to say, that under the 71st clause of this local act, it was necessary that a summons should be issued before a warrant could be granted. There are several clauses in this act which provide for the recovery of penalties and damages by summary proceedings before magistrates; scarcely any two of them agree in their terms, and in none of them is a summons mentioned, unless in the 69th section, (a) which relates to damages done to lamps. It cannot be supposed that it was intended that justices should only summon in that case. Taking all the provisions together, the intention was, that the justices should issue their warrant for the recovery of such damage, after a summons had been issued, or other proper steps taken. The question in truth comes to this, whether the issuing of a warrant by the justices was a ministerial or a judicial act. If it be judicial, the justice cannot have issued his warrant previously to his having decided some question, which it is impossible that he can have properly determined without *hearing* the accused. It was said by Mr. *Cowling*, that the party against whom a warrant issues may, after the goods are seized and before they are sold, apply to the magistrate to set aside his warrant, if it has improperly issued. But that is not a satisfactory answer, because although in this case five days intervened between the seizure and the sale, it is not obligatory on the magistrate to allow any time, and the goods may be sold immediately after they are seized. In *Webb v. Batchelour*, it was assumed throughout that the warrant was bad for want of a previous summons. The words of the act of parliament, upon which the decision in that case turned, are, "not having a reasonable excuse, to be allowed by the said justices;" but

(a) Sect. 69. "That if any person shall carelessly or negligently break any lamp, and shall not, upon demand made by the said Company, or their clerk, or superintendent, or other person or persons authorized by them, make satisfaction for the damage done, then and in every such case it shall and may be lawful to and for any one or more justice or justices of the peace for the said town of Liverpool or county of Lancaster, (as the case may require,) and he and they is and are hereby required, upon complaint to him or them made, to summon before him or them the party or parties against whom such complaint shall be preferred; and upon hearing the allegation and proofs on both sides, or on non-appearance of the party or parties so complained against, after due proof of such party or parties having been summoned to appear, to award such sum or sums of money, by way of satisfaction to the said Company, or to such other person or persons, (as the case may require,) for such damages, as such justice or justices shall think reasonable; and in case of neglect or refusal to pay any sum or sums so awarded, within three days after demand, it shall and may be lawful to and for such justice or justices, or any one of them, and he and they is and are hereby required to cause the same to be raised and levied by distress and sale of the goods and chattels of such person or persons, by warrant under the hand and seal, or hands and seals, of such justice or justices."

Sect. 81. "That all penalties and forfeitures by this act imposed, or by any rule, order, or bye-law, made in pursuance thereof, in relation to which the manner of convicting the offender is not particularly mentioned or directed, shall be adjudged by and recovered before any justice or justices of the peace for the said borough of Liverpool or county of Lancaster, (as the case may be,) in a summary way, and who is and are hereby authorized and empowered to convict the offender or offenders; and that in default of payment of such penalties or forfeitures, the same shall be levied by distress and sale of the offender's goods and chattels, by warrant under the hand and seal or hands and seals of such justice or justices."

the whole case shows that even at that time a summons was held to be necessary, before a warrant issued in execution, which, as my brother LITTLEDALE has pointed out, differs from a warrant in the nature of mesne process, which is issued only to bring the party before the magistrate.

The remaining question is, whether the defendants can justify under this warrant, bad as it is, and directed not to them, but to their clerk, in an action for the conversion of the goods which were sold by them under the warrant. The principle upon which an officer is justified under a warrant which he executes is, that he is *bound* to obey it. The Company were not bound to obey this warrant. The *clerk* might have been indicted for disobedience to it, but the *Company* could not. The Company choose to interfere and identify themselves entirely with their clerk. This is an action against the Company for taking the goods. They say the goods were taken by our clerk, with our authority; and they are in possession of the proceeds of the sale. They are bound to answer this action, and must show a legal warrant.

WILLIAMS, J.—The issuing of the warrant by the justice was, in my opinion, a *judicial* act. This is apparent from the warrant itself, and likewise from the act of parliament. By the 71st section of the local act, no proceeding can be taken for the recovery of rent until the expiration of ten days after demand. I cannot imagine that it would be enough merely to demand a warrant from a justice without any inquiry on his part as to the propriety of issuing the warrant, any more than it would be in the case of a warrant to arrest for felony. The act, therefore, being clearly judicial, the party against whom the application was made should have an opportunity of being heard. It might be that he had no gas, or he might have paid for the gas which he had consumed. *Rex v. Benn*, 6 T. R. 198, was certainly decided upon another statute. But I believe what is there laid down by Lord KENYON to be law, that no one shall suffer either in person or in purse without having an opportunity of being heard. As to the other point, *Webb v. Batchelour*, 1 Ventr. 273, has been cited to show that the Company are justified under the warrant; but the whole of the argument on this point assumes that the defendants are in the same situation as *officers* acting under the warrant. There is no analogy between the two cases. An officer is protected in the execution of a warrant, because he is not required to inquire into the regularity of the warrant he executes. It would be wild work indeed, if a constable, to whom the execution of a warrant to arrest for murder, should be bound to inquire whether the circumstances of the case were such as constituted that crime. The commencement of the plea shows that the defendants are neither officers nor in a situation similar to officers. They are the persons who set the whole proceeding in motion. By their authority Parkinson, who is their clerk, obtains the warrant. The money is raised to pay their dues, and it is received by them for their own benefit.

LORD DENMAN, C. J.—It seems to me not improper to mention the case of *Harper v. Carr*, 7 T. R. 270, where Lord KENYON said, "It is an essential rule in the administration of justice, that no man shall be punished without being heard in his defence. The party must be summoned before a warrant of distress is granted, as we decided in *Rex v. Benn*, and on that summons many circumstances may appear to show that a warrant of distress ought not to be granted." It there-

fore appears that Lord KENYON acted upon the decision of *Rex v. Benn.*

Judgment for the plaintiff. (a)

(a) An officer is bound to obey the orders of a Court which has jurisdiction over the subject-matter; but if the Court has no jurisdiction, the order affords no protection to the officer; see 5 Howell, State Trials, 1163, 1 Vent. 250, 4 Burr. 2419, 2472; *Brown v. Compton*, 8 T. R. 424; *Prestidge v. Woodman*, 2 Dowl. & Ry. 43, and 1 Barn. and Cress. 12.

DOE on the demise of the Baron and Baroness DE RÜTZEN
v. LEWIS.

A lease contained a general covenant to repair, and also a covenant, that it should be lawful for the lessor to enter and see the state of the premises, and to give notice in writing of all defects; and that in case the lessee should neglect to repair, it should be lawful for the lessor to enter and repair, and that the lessee should repay the money so expended, together with the next half year's rent; and there was a power of distress for the amount, as in case of rent. The lease also contained a clause of re-entry, on the breach of any covenant. The landlord gave the tenant notice to repair a certain portion of the premises before certain specified periods of time, and that in default of his doing so, he should enter and do the repairs himself. Held, that this notice was a waiver of the right to enter for the breach of the general covenant to repair.

The first lessor assigned to A., from whom the reversion descended to B., who died leaving two sisters coparceners; *quære*, whether one sister can take advantage of a condition for re-entry in the lease, and whether the condition can be apportioned so as to enable her to recover a moiety?

Quære also, whether the tenant, after payment of rent to her, could dispute her title. (a)

EJECTMENT for a farm in the parish of Minwere, in the county of Pembroke, on the joint demise of Charles Frederick Baron De Rützen, and Mary Dorothea his wife, before WILLIAMS, J., at Haverfordwest, at the Spring assizes, 1832.

The defendant held under a lease of 13th February, 1786, from William Knox to John Morris. The lessors of the plaintiff claimed under Knox, and the defendant under Morris.

The lease contained a general covenant to keep the premises in repair, and also a covenant (b) that it should be lawful for Knox, his heirs or assigns, with workmen, &c. to enter upon the demised premises, to view, search, and see the state and condition thereof, and upon every such view, if he or they should think fit to give or leave at the demised premises notice in writing to or for Morris and his heirs, of all defects and want of reparation then found; and in case he or they should neglect to repair the defects within two calendar months after such notice, it should be lawful for Knox, his heirs or assigns, or his and their agent, with workmen, &c. to enter and to do such repairs as he or they should think necessary to be done, and that Morris or his heirs would repay to Knox, his heirs or assigns, so much money as should be expended by him and them for work and materials in doing such repairs, at the time of paying his or their next half year's rent which should become due after the money should have been so laid out and expended; and in case Morris or his heirs should neglect or refuse to pay the same as aforesaid, it should be lawful for Knox, his heirs or assigns, to enter upon the premises and distrain for the same, as in the case of rent in

(a) Vide ante, vol. iv. 291, note to *Doe d. Bullen v. Mills.*

(b) *Quære*, whether this provision amounted in law to a covenant.

arrear. The lease contained several other covenants, and a proviso that if all the covenants were not kept, the lease should be forfeited, and that it should be lawful for the lessor, his heirs and assigns, to re-enter and take possession. The following notice was given on the 10th of July, 1830, to the defendant, by the agent of the Baron de Rützen.

“Take notice, that on receipt of this you are required to fulfil all the covenants and agreements contained in your lease or leases granted to you of the messuage, tenement and lands called Minwere House Farm; and that in case of your neglecting in anywise so to do, every building, hedge, &c. will be put incovenanted order and repair for you, and you will be charged with the costs, &c.; or should there be any further breach of covenant, that it will affect the existence of your lease or leases.”

On the 24th of November, 1830, a further notice was given, of which the following is a copy:—“As you have not, in pursuance of the notice served on you on the 10th day of July last, repaired the messuage, tenement and lands which you hold under the Baron and Baroness de Rützen, situate, &c., I hereby give you further notice to repair the hedges, gates and fences on the said premises, on or before the 30th day of December next, and the houses, offices, and other buildings on the said premises, on or before the 31st day of May next, and in the event of your neglecting to make such repairs at such respective periods as aforesaid, I hereby, on behalf of the said Baron and Baroness de Rützen, give you notice, that they will cause such respective repairs to be made, and charge you with the expenses of the same, according to the provisions in your lease or leases of the said premises for that purpose contained.”

The lessors of the plaintiff, after deducing title from the original lessor to Nathaniel Phillips, proved payment of rent under the lease in question to Phillips. Phillips died in December, 1813, upon which the property descended to his son. He dying without issue, it descended to Edward Augustus Phillips. He died also without issue, leaving two sisters, the Baroness de Rützen and Lady Lichfield. The defendant had married the daughter of Morris, the lessee, and by that means had become entitled to the lease. The Baron and Baroness de Rützen entered upon the estate, and the defendant paid rent to them.

It was objected, first, on the part of the defendant, that the lessors of the plaintiff had not shown that they were possessed of the reversion. To this it was answered, that the payment of rent was a sufficient acknowledgment of title, and that after that acknowledgment the title could not be disputed, but that at all events, as the Baroness was shown to be entitled to a moiety in the reversion, as coparcener with Lady Lichfield, the lessors of the plaintiff were entitled to recover that moiety. To this it was replied, that both coparceners ought to have joined to take advantage of the breach of condition. It was secondly objected, that the notice which had been given by the lessors of the plaintiff, that they would enter and repair, was an adoption of the special covenant as to repairs, and was a waiver of the forfeiture incurred by the non-repair, under the general covenant.

A verdict was found for the plaintiff, and the learned judge gave the defendant leave to move to set that verdict aside, and enter a nonsuit. A rule having been accordingly obtained, cause was now shown by

John Wilson, Chilton, and James. It is said that the reversion was not in the lessors of the plaintiff; but it was in evidence that the defend

ant had paid rent to them. There are only two exceptions to the rule that the defendant cannot dispute the title of his landlord, to whom he has paid rent; first, where the title has expired; and secondly, where the rent has been paid by mistake. It was said at the trial, that there could be no *apportionment* of a condition, but at all events the lessors were entitled to recover a moiety; *Doe d. Gill v. Pearson*, 6 East, 173, 2 Smith, 205. It is true that a condition cannot be apportioned by the act of the party, but it may be by act of law. Where one has the entire condition, he cannot by his own act divide it; but by act of law it may be divided, as by recovery in waste, or descent of part of the reversion in gavelkind, or borough-English; but not by grant of the person himself; *Appowell v. Monoux*, Sir Fra. Moore Rep. 97; *Dumpor's Case*, 4 Co. Rep. 120 a. Two coparceners of a reversion with condition make partition by agreement, the condition is gone. (a) But if by writ, the condition remains. (b)

It is said that the notices given were an election on the part of the landlord to proceed on the special covenant, and not on the general covenant to repair. The notices are not of such a nature as would have enabled the landlord to proceed on the special covenant. The special covenant could only be put in force after an entry and search by the landlord. The notices in question stated no entry or search, and pointed out no specific defects, the repairing of which was required.

Besides, the covenants are independent of each other. Assuming that the notices which were given should be considered as notices under the special covenant, yet the landlord was not bound to act upon that notice, but might still resort to the general covenant. The condition for re-entry is very general in its terms, and unless the Court introduce an exception, it must be considered as applicable to this case. That the remedies on the two covenants are cumulative, appears from many authorities. *Roe v. Pain*, 2 Campb. 520; *Wood v. Day*, 7 Taunt. 646, (2 E. C. L. R. 245;) *Doe d. Meux*, 7 Dowl. & Ryl. 98, S. C. 4 B & C. 606, (10 E. C. L. R. 417,) may be cited on the other side. In that case the lease contained covenants to keep the premises in repair, and also to repair within three months after notice; there was a clause of re-entry for breach of any covenant, and the premises being out of repair, the landlord gave a notice to repair within three months. It was held that this was a waiver of the forfeiture incurred by the breach of the general covenant to keep the premises in repair, and that the landlord could not bring ejectment until after the expiration of three months. But here there is a continuing breach of covenant, which there was not in *Doe v. Meux* and *Doe v. Peck*, 1 B. & Ad. 428, (20 E. C. L. R. 417,) which shows, that although there may be a waiver, yet if there be a continuing breach after the waiver, ejectment may be maintained.

J. Evans, and *E. V. Williams*, contrâ. As to the first point, it is not supposed that by descent from an ancestor to coparceners, the condition is done away with; but it is contended that coparceners, forming one heir, must act together, and not separately. The authorities cited show that there may be an apportionment by act of law, and for this *Dumpor's Case* is cited. The example given in that case is a descent of land to which a condition was annexed, part of which was borough English. There part of the entire land descended to the customary heir,

(a) Per Periam, J., who said it was so adjudged; 4 & 5 Phil. & Mary, Sir Fra. Moore, 203.

(b) Per Anderson, C. J., ib. 205. And see the cases collected, 5 Vin. Abr. 298, &c.

and part to the common law heir. Here the whole land descended to the two coparceners. In *Stedman v. Butes*, 1 Salk. 390, the defendant made cognizance, as bailiff to the Countess of Salisbury, for rent in arrear; for that J. S. was seised and made a lease, &c. and died, and the reversion descended to the Countess and her sister, as heir. On demurrer the Court held this cognizance naught; for by LITTLETON himself, both sisters must join, both take as heirs by descent, and make but one heir, to whom the rent descends as one entire inheritance. [LITTLEDALE, J. There is a manuscript note to *Dumpor's Case*, by Serjeant Hill. PATTESON, J. The coparceners are assigns.] It is not, because rent has been paid to the Baron de Rützen, that he is proved to be assignee of the reversion. Assuming that they are coparceners, there is no authority to show that one of two coparceners may recover a moiety in ejectment.

It cannot be inferred from the language of the special covenant, that the notice of an intention to act upon it should specify the particular defects which the tenant is required to repair. If the notice had been as general as the terms of the covenant itself, it would have been sufficient. The second notice, which was given on the 24th November, required the tenant to repair the gates and fences before the 30th December, and the buildings before the 31st May. So long as that notice was unrecalled, no advantage could be taken of the forfeiture by the lessors. Negotiations subsequently took place, and those negotiations may be considered as a suspension of the notice. But when they terminated, the notice was still subsisting. Undoubtedly the general covenant to repair, and the special covenant, are independent of each other; but the lessors have affirmed the existence of the tenancy until the expiration of the notice. The notice still exists; it was not withdrawn, it was only suspended. [PATTESON, J. If there had been simply a covenant to repair within three months after notice, and a general covenant to repair, and a notice to repair within three months had been given, and the tenant had failed to repair, the landlord, at the expiration of the three months, might have resorted to the general covenant to repair; *Doe d. Runkin v. Brindley*.] (a) The landlord's remedy was, to do the necessary repairs, and he might then have distrained for the amount at the next rent day.

LORD DENMAN, C. J.—In this case it was incumbent on the lessors of the plaintiff to show that they represented the original lessor. It is not, however, necessary to enter into the question as to the title, because we are of opinion that the rule should be made absolute upon the other point. The lease contains two covenants as to repairs; the one a covenant to repair generally, and the other a covenant which enables the lessor to enter upon the property to ascertain what repairs are wanted; and provides that, in case the lessee should neglect or refuse to repair, then the lessor may do the necessary repairs, and recover the amount which he had expended, as rent. Assuming that the lessors of the plaintiffs have, by the notice which they have given, taken upon themselves the burthen of doing the repairs, that must be considered as a waiver by them of the right of entry acquired by the breach of the general covenant to repair. What is the effect of the notices in this case? On the 10th of July a notice is given requiring the defendant to fulfil the covenants contained in the lease, and informing him that, in

case of his neglecting to do so, the buildings and fences would be put into repair, and that he would be charged with the costs. That notice expired in September. No advantage was taken of it; but on the contrary this further notice was given. (Here his lordship read the second notice.) In this notice the defendant is apprised that, if he neglects to do the repairs, the landlord will do them. After that notice, the tenant would not have been justified in doing the repairs himself. The lessors took the matter into their own hands in a manner which was perfectly inconsistent with their availing themselves of the forfeiture. It seems to me, therefore, that they have waived their right under the general clause, and are not in a situation to maintain this action.

LITLEDALE, J.—I am entirely of the same opinion. The landlord, by the second notice, waived the right to proceed on the clause of re-entry for the breach of the general covenant to repair. At the expiration of the periods of time specified in the second notice, the landlord might have entered and done the necessary repairs. The cost of those repairs he would be entitled to charge the tenant, and levy the amount by distress. I consider the other point as very doubtful. It is said in *Dumpor's Case*, "if a man seised of two acres, the one in fee, (at common law,) the other in borough-English, and has issue two sons, and leases both acres for life or years, rendering rent with condition, the lessor dies; in this case, by this descent, which is an act of law, the reversion, rent, and condition, are divided." There is good reason for that, because each of the sons has an entire estate. But here the lessors are coparceners with another person.

PATTESON, J.—I entirely agree as to the effect of the notices. The lessors of the plaintiff have thereby waived their right to proceed. *Rea v. Paine* is almost the only case to show that the general covenant to repair, and the special covenant, are independent of each other. But in that case the special covenant was to repair *after the expiration of three months' notice*. The notice given was to repair *forthwith*, and the plaintiff recovered upon the general covenant to repair. In *Doe v. Meux*, BAYLEY, J., does not say that they are independent covenants. But in the judgment of HOLROYD, J., they appear to be considered as independent, though the *acting* upon the special covenant might be considered as a waiver of the breach of the general covenant. In *Doe v. Brindley* the lease contained a general covenant to repair, and a proviso that, if at any time the premises should not be repaired within three months next after notice in writing given by the landlord, or in case of breach of the other covenants, then it should be lawful for the landlord to re-enter. A notice was given by the landlord, and before the expiration of the three months he brought ejectment. During the three months, it was agreed by an order of Nisi Prius that the premises should be put in repair. They were not put in repair, and the landlord brought a second action of ejectment. It was held that the order of Nisi Prius was no waiver of the notice, but a suspension only, and operated as an enlargement of the time within which the tenant was to repair. It was a postponement only for the benefit of the tenant. In the present case the time is not enlarged for the benefit of the tenant. The landlord here says to the tenant, I will take advantage of the special covenant which obliges you to repair within a certain time, and, if you neglect to repair by that time, I will enter upon the premises and do the repairs myself. The tenant says he will do nothing, but will

leave his landlord to pursue his remedy under the special covenant as to repairs. Clearly the relation of landlord and tenant, so far from being put an end to, is affirmed. The landlord cannot bring ejectment as upon a forfeiture, because he has put it out of the power of the tenant to do any thing in the shape of repairs. I give no opinion on the other point.

WILLIAMS, J.—The remedy given under the special covenant to repair is inconsistent with the co-existence of the remedy under the general clause of re-entry. The tenant received notice to do the repairs, and that, if he did not do them, the landlord would do them for him and charge him with the expenses. The necessary and natural effect of such a notice is to suspend all repairs by the tenant. There is no clause of re-entry in case, after such a notice, the tenant should neglect to repair. The only remedy the landlord has, is to enter and do the repairs, and to levy the expenses by distress.

Rule absolute.

Ex parte DUFFIELD and another.—p. 865.

The Court granted a rule absolute in the first instance for a mandamus to the official to administer the declaration, prescribed by 5 & 6 Will. 4, c. 62, s. 9, to persons claiming to have been duly elected as chapelwardens of a chapel, erected under a local act, conferring upon the persons elected the general powers of churchwardens, although other persons also claimed to have been duly elected.

REPORTS OF CASES
ARGUED AND DETERMINED
IN THE
COURT OF KING'S BENCH,
AND
Exchequer Chamber.

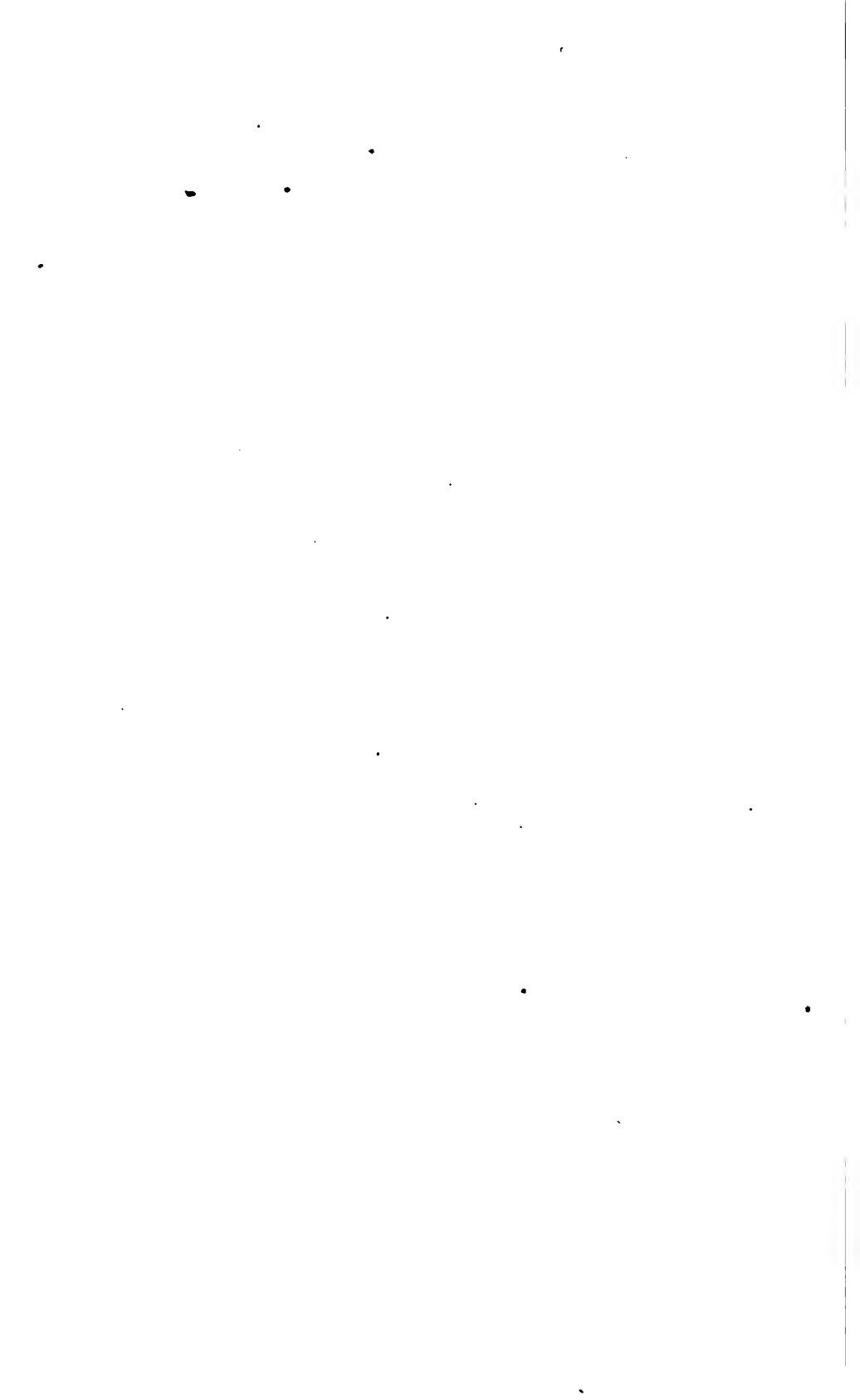
By S. NEVILE, Esq., OF THE INNER TEMPLE,
AND
T. E. PERRY, Esq., OF THE INNER TEMPLE,
BARRISTERS AT LAW.

VOL. I.

CONTAINING CASES IN MICHAELMAS TERM, 1836, AND HILARY AND
EASTER TERMS, 1837.

1836-7.

PHILADELPHIA:
T. & J. W. JOHNSON & CO., LAW BOOKSELLERS,
NO. 197 CHESTNUT STREET.
1857.



C A S E S
ARGUED AND DETERMINED
IN THE
COURT OF KING'S BENCH,
IN
Michaelmas Term,
IN THE
Seventh Year of the Reign of William IV.—1836.

THE Judges in Banc this term were,
Lord DENMAN, C. J. WILLIAMS, J.
PATTESON, J. COLERIDGE, J.

In the Bail Court,
LITLEDAL, J.

RULE OF COURT.

3d Nov., 1836.

IT IS ORDERED, That from and after the last day of this term all Rules upon Sheriffs, other than the Sheriffs of London and Middlesex, to return Writs of mesne or final process, and Rules to bring in the bodies of Defendants, be eight-day Rules, instead of six-day Rules.
(Signed by the fifteen Judges.)

The KING v. The Churchwardens and Overseers of the Poor of EDLASTON.—p. 20.

1. A mandamus will issue to compel one of the churchwardens and one of the overseers to concur in making a rate for the relief of the poor, where they refuse to consent unless the rate expressly stated that certain inclosures are within a particular district of the parish.
 2. The rule for a mandamus, to concur in making a rate for the relief of the poor, is absolute in the first instance.
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The KING v. TEMPLAR and others.—p. 91.

The Court of K. B. will not remove an indictment from the Central Criminal Court by certiorari, on the ground that a difficult question of law will arise.

REX v. The Inhabitants of MILVERTON.—p. 179.

1. An order of justices under 55 Geo. 3, c. 68, stopping up more than one highway, is void.
2. Such an order, stopping up *part* only of a highway, is void.
3. Justices have no authority to narrow a highway.
4. *Semble*, justices have no power to stop up a road out of the division or hundred for which they act.

The KING v. The Mayor and Assessors of HYTHE.—p. 239.

Where the names of certain burgesses, duly qualified in other respects, were objected to, and expunged from the burgess-lists, by the mayor and assessors, on revision, on account of the non-payment of the shilling required by 2 Will. 4, c. 45, s. 56, the Court of K. B. considered that they had not the power to grant a mandamus to insert the names.

Lord BOLTON v. OTHWELL TOMLIN and two Others, Executors of JOHN TOMLIN.—p. 247.

In December, 1819, the testator's father was tenant of a farm belonging to the plaintiff till the following Lady-day. The plaintiff's steward, in the month of December, proposed to let the farm, and read from a printed paper the terms of letting. The testator was present and assented to those terms, agreeing to succeed his father at Lady-day, but no writing was signed. He did then enter and continued tenant till his death, since which the defendants (his executors) occupied and paid rent. At the foot of the printed paper of terms was written a memorandum, not signed by either party, but by the attorney of the plaintiff, who was present at the time of the letting. This memorandum commenced in the following terms: "A. B., as agent of the plaintiff, agreed to let, and C. D. agreed to take," and went on to state the farm, rent, and when payable; that the term was for one year certain, from Lady-day next, and so from year to year, until a due notice to quit was given. It was held that this agreement, *followed by entry* and payment of rent, created a tenancy, upon the terms contained in the printed paper and memorandum, and that they might be referred to by the attorney, (the witness,) as showing what the terms of the demise were.

ASSUMPSIT. The declaration stated that John Tomlin became and was tenant to the plaintiff of a certain farm in the county of York for one year, and so from year to year, until the plaintiff, or the said John Tomlin, should give to the other due notice to quit, at the sum of 754*l.*, to be paid yearly, for the occupation of the said farm, and also upon certain terms and conditions. A great variety of special conditions respecting the mode of cultivating the farm were set out. The declaration then stated the promise to pay the rent and cultivate the farm, upon the conditions; the death of Tomlin, his will, and the probate of it; that the defendants entered upon the land; that a sum of money was due for rent; and then averred ten separate breaches of the above conditions in the time of the executors. Pleas: 1st, non assumpsit by John Tomlin; 2nd, performance; 3d, a discharge from payment of the rent, and two other pleas, which it is not necessary to mention. At the trial at the York Lent Assizes for 1835, before PARKE, B., it appeared that Lord Bolton had a great many farms in the neighbourhood of the farm in question, and that the mode in which the steward let the farm was as follows. If any one applied to take a farm, a set of printed rules was placed in his hands, and if he was satisfied with the conditions and the rent of the farm, it was let to him. A short time afterwards, a

memorandum was made at the end of the printed rules, mentioning the amount of the rent, the number of acres of the farm, and other particulars. The rules were read over to the tenants as a body, and the memorandum was read over to each particular tenant, and Lord Bolton's solicitor then signed the memorandum. The memorandum at the foot of the rules in the present case was as follows: "Memorandum. W. S. of _____, &c. (Lord Bolton's steward) as agent for and on behalf of Lord Bolton, agreed to let to John Tomlin, and the said John Tomlin agreed to take of the said W. S. all that farm, &c., for the term of one year, and so from year to year, until one of the said parties shall give the other notice to quit, at and under the yearly rent of 750*l.*, to be paid in equal half-yearly payments; that is to say, on the 25th March and on the 29th September in each year, subject to the within printed regulations and conditions, in the presence of me Lupton Topham," (Lord Bolton's solicitor.) The rules and this memorandum were read over in the presence of the plaintiff, according to the usual custom, as above stated. This was on the 16th of December, 1819. At that time the farm was in the occupation of John Tomlin's father, who continued to occupy until Lady-day following. John Tomlin then entered and occupied until his death, which happened on the 29th June, 1821, he in the meantime having paid the year's rent up to the 25th March, 1821. Upon his death, his executors, the defendants, entered and occupied without any fresh agreement, during the time the alleged causes of action accrued. It was proved that on one occasion they had applied to the steward for permission to depart from some of the terms mentioned in the rules. These rules and the memorandum (which had been stamped with a lease stamp) were received in evidence, and read to the jury. A verdict passed for the plaintiff, subject to the following objections, on which *Cresswell* subsequently, pursuant to leave given, obtained a rule nisi for a nonsuit, viz. that the agreement did not operate as a demise; and, secondly, that it was void as an agreement, not being to be performed within a year, and not being signed by John Tomlin, who must therefore be taken to have held, not under the terms of the rules, but only under such terms as were incident to the relation of landlord and tenant.

Alexander and *J. Addison* showed cause on a former day (Nov. 21st) in this term. (a) This was a parol lease. By the 1st section of the Statute of Frauds, all leases, not put in writing and signed by the parties making the same, shall have the force of leases or estates at will. But this is removed from the operation of that clause by the 2nd section, which in terms exempts leases not exceeding three years. It was said at the trial that this instrument could not be a lease, inasmuch as a present interest did not pass: but that it was a mere agreement for a lease to commence at a future day. But *Ryley v. Hicks*, 1 Stra. 651, answers that objection. There it was held that a demise by parol on 24th February, of a cellar, from Lady-day then next, for a quarter of a year, and so from quarter to quarter, so long as both parties should please, at 6*l.* a quarter, was good. In Selwyn's *Nisi Prius*, p. 831, 8th edit., *Ryley v. Hicks* is cited, with the observation, that "in *Inman v. Stamp*, B. R. Trin. 55 Geo. 3, DAMPIER, J., said, that the practice had been with the foregoing case of *Ryley v. Hicks*, although he rather inclined to think that the 2nd section of this statute, taken with section 4, was con-

(b) Before Lord Denman, C. J., Patteson, J., Williams, J., and Coleridge, J.

fined to leases executed by possession, on which two-thirds of the improved rent were reserved." There is therefore, on the one hand, a decision of this Court with a corresponding practice, and on the other, the opinion of DAMPIER, J. In the note to *Took v. Glascock*, 1 Wms. Saund. 250 f., it is also laid down, that a lease, although to take effect at a future day, vests a present interest.

But it is argued that this is an agreement for a lease, and not to be performed within a year, and that the 4th section of the Statute of Frauds requires that such an agreement should be in writing, and signed by the party to be charged therewith; and when the rule was moved for, *Bracegirdle v. Heald*, 1 B. & A. 722, was cited. In that case it was held, that a contract for a year's service, to commence at a subsequent day, being a contract not to be performed within the year, is within the fourth section of the Statute of Frauds, and must be in writing. That case is, however, distinguishable from the present. The contract here is a lease, not an agreement. There may be a parol letting for a term not exceeding three years. As soon as the party answered in the affirmative to the question, do you take on these terms? there was instantly a demise. It is not contended that the written instrument was itself a lease, but that it may be used to show the terms of the parol demise. In *The King v. The Inhabitants of St. Martin, Leicester*, 4 N. & M. 202, S. C. 2 Ad. & Ell. 210, (29 E. C. L. R. 78,) to prove a settlement by renting a tenement, a witness produced a book containing the entry of an agreement for a present demise of a house at 11*l.* per annum. He further stated, that he let the house as agent to his father, who was present, and that the terms were reduced to writing, to prevent mistake, and signed by the wife of the pauper, the husband not being present, but that the entry was not signed by the witness or his father, nor did their names appear in any part. It was held that the entry itself was neither a lease nor an agreement for a lease, but that the witness might look at the entry to refresh his memory. So, in the present case, the written instrument is neither a lease nor an agreement for a lease; but it may be referred to by the witness as showing what the terms of the letting were. *The King v. Inhabitants of Wrangle*, 4 N. & M. 375, 2 A. & E. 514, (29 E. C. L. R. 160,) is in point for the present case. There the terms of an agreement for the hiring of a servant were, by the direction of the parties, written down by a third person, and the writing was read over to the parties, but not signed by them. The Court held, that parol evidence of the terms of the hiring was admissible. It is also contended by the other side, that this agreement, not being under seal, could not operate as a demise; because, at the time it was made, there was a subsisting demise. But this objection is untenable, inasmuch as the subsisting demise was for a shorter term; and at the end of that term there was an entry by John Tomlin under the new demise; Bac. Ab. title *Leases*, (N.) But, supposing the agreement not to be a demise, and not to be binding as an executory agreement; yet, as John Tomlin and the executors successively entered, and occupied in pursuance of the agreement, they must be taken to have held under the terms of the agreement. They paid the rent mentioned in the memorandum, and by applying, as was proved, for permission to depart from some of its terms, they recognized its existence. *Doe v. Bell*, 5 T. R. 471, and *Richardson v. Gifford*, 3 N. & M. 325, S. C. 1 A. & Ell. 52, (28 E. C. L. R. 35.)

Cresswell and *Wightman* in support of the rule. The declaration is founded on an agreement, which is not to be performed within a year; and the written instrument containing the agreement, not being signed by the party to be charged therewith, was not admissible in evidence by reason of the 4th section of the Statute of Frauds. In *Rex v. Wrangle*, 4 N. & M. 375, S. C. 2 A. & E. 514, (29 E. C. L. R. 160;) and in *Rex v. St. Martin's, Leicester*, 4 N. & M. 202, S. C. 2 A. & E. 210, (29 E. C. L. R. 78;) it was held, that the witness might refer to the paper to refresh his memory. In the present case, the paper was read to the jury, and the witness did not refresh his memory with it. This was not a lease, as no present interest passed; *Doe d. Rawlings v. Walker*, 7 D. & R. 487, 5 B. & C. 111, (11 E. C. L. R. 171,) and therefore is not within the exception in the 2nd section of the Statute of Frauds. If this is an agreement for a demise for a year, to commence from Lady-day, it was an agreement not to be performed within a year. It would appear from *Say v. Smith*, Plowden, 268—273, that a lease from year to year, is a lease for two years. It may be true that, by the entry of the testator, a tenancy was created; but the terms of the agreement cannot be imported into the contract, unless the agreement was in conformity with the 4th section of the statute. The terms of the agreement do not flow from the relation of landlord and tenant. [PATTESON, J. Do you contend, that there cannot be a parol demise for two years, on special terms?] If parties agree in respect to a demise for a year, to commence at a future period, the terms must be reduced to writing and signed by the party to be charged. In *Boydell v. Drummond*, 11 East, 142, it was held, that a written paper containing the terms of the contract, not signed by the party to be charged, could not be referred to; so here the memorandum and the printed rules, not being signed, could not be referred to as showing the terms of the contract. The words of the Statute of Frauds are express. If, where there is no writing, the terms of the contract are implied in law, and there can be no danger of perjury; but there may be, if special terms are allowed to be engrafted on the contract implied by law. [PATTESON, J. According to your argument, in a tenancy from year to year to commence at a future period, no rent could be reserved. The action by the landlord must always be on a *quantum meruit*.] The same objection might be urged to the decision in *Bracegirdle v. Heald*, 1 B. & Ald. 722. *Inman v. Stamp*, 1 Stark. 12, (2 E. C. L. R. 273,) is an authority in point. The written instrument could not be considered as a lease on the 16th of December. It is not therefore within the exception of the 2nd section; but being an agreement not to be performed within a year, it is within the 4th section of the Statute of Frauds.

LORD DENMAN, C. J., on this day delivered the judgment of the Court, as follows:—This was a special action of assumpsit for breach of the terms of a parol lease. The defendants were executors of the lessee. The facts were, that in the month of December, 1819, the testator's father was tenant of the premises till the following Lady-day. The plaintiff's attorney, in the month of December, proposed to let the plaintiff's farms at a meeting, and read from a printed paper the terms of letting. The testator was present, and assented to those terms, agreeing to succeed his father at Lady-day, but no writing was signed. He did then enter and continued tenant till his death; since which the defendants (his executors) have occupied and paid rent. At the foot of

the printed paper of terms was written a memorandum, not signed by either party, but by the attorney of the plaintiff. This memorandum commenced in the following terms:—"A. B., as agent of the plaintiff, agreed to let, and C. D. agreed to take," and went on to describe the farm, state the rent, and when it was payable,—that the term was for one year certain from Lady-day next, and so from year to year, until a due notice to quit should be given. The plaintiff had a verdict, with liberty to the defendant to move for a nonsuit. It is contended on behalf of the plaintiff, that the testator became tenant at all events on his entry at Lady-day, 1820, if not before, and that the memorandum might properly be adverted to for the purpose of showing the terms of the tenancy, although not to show any agreement to become tenant. On the other hand, it is contended, that this was an agreement not to be performed within a year, and so required to be in writing, and signed, by the 4th section of the Statute of Frauds; and that although a tenancy from year to year may have been created, yet that the terms of it could be only such as result by law from the mere relation of landlord and tenant, there being no writing to satisfy the statute. Now assuming that what passed in the month of December did not amount to a demise, (see *Inmun v. Stamp*, 1 Stark. 12, (2 E. C. L. R. 273;) *Edge v. Stratford*, 1 Cr. & J. 391,) and that whilst it remained an executory agreement, the performance of it could not be enforced; yet it by no means follows, that when an actual demise by parol took place, and which was valid under the second section of the statute, and a tenancy was actually created by entry and payment of rent, the terms of that tenancy may not be proved by parol. Leases not exceeding three years have always been considered as excepted, by the second section, from the operation of the first; and it seems absurd to say that a parol lease shall be good, and yet that it cannot contain any special stipulations or agreements. No authority is, or can be cited to show that it may not. On the contrary, it has always been assumed, that a parol lease warranted by the second section may be as special in its terms as a written one, and we are of opinion that the law is so. But it is contended, that in this view of the case, the memorandum could only be used to refresh the memory of a witness; and perhaps that may be so. We cannot find that it was used substantially in any other manner; certainly it was not treated as being in itself a binding instrument; and whether in fact it was read by the officer of the Court, or by the witness, is immaterial, no objection on that ground having been taken at the trial. On these grounds we are of opinion, that the verdict is right, and that this rule to enter a nonsuit must be discharged.

Rule discharged.

DOE on the demise of CROSTHWAITE and another v. DIXON and another.—p. 255.

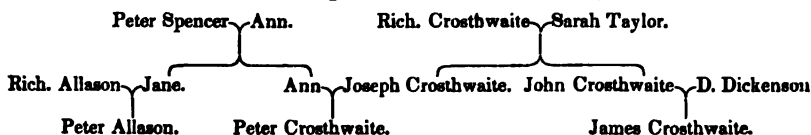
A. and B., being seised of land in coparcenary, B. conveyed his moiety to a purchaser in fee. The purchaser and A., the other parcener, made partition by lease and release, and conveyed the whole to H. and his heirs; as to one portion to the use of B. in fee; as to the other portion to the use of A., in fee. Held, that A.'s portion remained descendible to his heir *ex parte maternâ*.

EJECTMENT brought for land in the parish of Brigham, in Cumberland. At the trial before Lord ABINGER, at the Summer Assizes for the county of Cumberland, in the year 1835, verdict was found for the plaintiff, with 1s. damages, subject to the opinion of the Court upon the following case:

The lessor of the plaintiff, James Crosthwaite, claims the property as heir *ex parte paternâ* of Peter Crosthwaite, deceased; and the defendants' claim is as devisees of Peter Allason, who was heir at law *ex parte maternâ* of the same Peter Crosthwaite.

One Peter Spencer was formerly owner of an estate of which the property in question forms a part, and upon his death his estate descended to his two daughters, Jane, the wife of Richard Allason, and Ann, the wife of of Joseph Crosthwaite, in coparcenary; upon the death of Jane, her estate in the premises descended to Peter Allason, her son and heir; and upon the death of Ann, her estate in the premises descended upon the said Peter Crosthwaite, her son and heir.

The following pedigree, which it is agreed is correct, shows the relative position of the different parties, and their title by descent.



In 1810 John Nicholson purchased Peter Allason's share of the property, and the same was duly conveyed by Peter Allason to John Nicholson by indentures of lease and release, dated respectively the 15th and 16th of November, 1810. The latter deed was made between Peter Allason of the one part, and John Nicholson of the other part, and the habendum was to John Nicholson, his heirs and assigns.

In 1816 Peter Crosthwaite and John Nicholson made partition of the property by indentures of lease and release, dated respectively the 15th and 16th of April, 1816. The latter deed was made between Peter Crosthwaite of the first part, John Nicholson of the second part, and John Huddleston of the third part; by it the whole of the property was released to John Huddleston, habendum as to one portion, being the premises sought to be recovered to the use of Peter Crosthwaite, and as to the remainder, to the use of John Nicholson.

Peter Crosthwaite from that time became and was sole seised thereof in fee, and died so seised in 1819, intestate. Upon his death Peter Allason entered into the premises in question, claiming to be entitled as heir *ex parte maternâ*, and continued possessed until the time of his death.

In 1831 Peter Allason died, having by his will, duly attested to pass
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real property, devised his estate and interest in the premises to the defendants.

John Huddleston, the other lessor of the plaintiff, is the releasor to uses mentioned in the deed of partition.

The question for the Court is, whether James Crosthwaite, being heir ex parte paternâ of Peter Crosthwaite, is, as such entitled to all or any part of the premises in question, or whether the defendant or devisees of Peter Ailason, who was heir at law of Peter Crosthwaite, ex parte maternâ, are entitled. If James Crosthwaite is entitled, the verdict is to be entered for all or such proportion of the property as the Court may direct. If not, a nonsuit is to be entered.

Wightman, for James Crosthwaite, the heir ex parte paternâ. By the partition which was carried into effect by the indenture of lease and release, the nature of the estate was changed, and the land became descendible ex parte paternâ. It is true that if a man makes a feoffment in fee, without declaring any use, and the use result, the nature of the descent will not be changed, and the use will descend in the same manner as the estate out of which it arose was descendible. But if the party declares the use and takes back an estate, the nature of the descent is changed; Co. Litt. 12 b; where it is said, "If a man be seised as heir on the part of his mother, and maketh a feoffment in fee, and taketh back an estate to him and to his heirs, this is a new purchase: and if he dyeth without issue, the heirs of the part of the father shall first inherit." (a) 2 Rolle's Abridg. 780, *Uses*, (D) 3; *Abbott v. Burton*, 2 Salk. 590, S. C. 1 Com. Rep. 160; *Godbold v. Freestone*, 3 Lev. 406. At all events, that portion of the estate conveyed by Nicholson was descendible ex parte paternâ, as it was acquired by purchase.

W. H. Watson, contra. The heir ex parte maternâ is entitled. Peter Crosthwaite took the land by descent ex parte maternâ. If a person seised of lands descendible ex parte maternâ, makes a feoffment, and declares the use to himself and his heirs, the use is descendible ex parte maternâ. This is laid down in *Martin v. Strachan*, 5 T. R. 107, n.; unless the party seised took a different estate, the line of descent is not broken. The effect of a partition is only to regulate the enjoyment of the estate; it does not alter the quality. Thus, in Comyns' Digest, Tit. *Parceners*, (C 15,) it is said, "upon partition made, the occupation and descent, which before were in common, shall be several and distinct." "So parceners after partition shall be in from the common ancestor as before, for the partition doth not make any degree," and for this Savile 113, *Thetford v. Thetford*, is cited. Partition by writ does not even operate as a revocation of a will, nor, according to *Luther v. Kidby*, 3 P. Wms. 170, n.; Vin. Abr. *Devise*, R. 6, pl. 30, does partition by deed. This proposition was doubted in *Tickner v. Tickner*, cited in *Parsons v. Freeman*, 3 Atk. 741, Amb. 116, and *Swift v. Roberts*, Amb. 617; but *Luther v. Kidby* is recognised in *Harwood v. Oglander*, 6 Ves. jun. 199, 8 Ves. jun. 106, and in *Goodtitle v. Otway*, Per Lord Kenyon, C. J., 7 T. R. 416, 417.

Wightman, in reply. Tenants in common are seised per mie et per tout. Nicholson was tenant in common with Crosthwaite. That part

(a) Mr. Hargrave's note to this passage is as follows:—"But here Lord Coke must be understood to speak of two distinct conveyances in fee; the first passing the use as well as the possession to the feoffee, and so completely divesting the feoffor of all interest in the land, and the second regranting the estate to him."

of the land which was conveyed by Nicholson to Huddleston, to the use of Crosthwaite, must have been taken by conveyance from Nicholson, and newly acquired; and of that part Crosthwaite became the first purchaser, and it was descendible to his heirs *ex parte paternâ*.

Cur. adv. vult.

LORD DENMAN, C. J., on this day delivered the judgment of the Court as follows:—

In this case one of two parceners alienated his moiety in fee, whereby the alienee and the remaining parcener became tenants in common. Afterwards, by deed of partition between the alienee and the remaining parcener, the land was divided by metes and bounds, and each of them took a moiety in severalty. The question is, whether by that deed the parcener took any thing as purchaser, so as to break the descent *ex parte maternâ*, and to let in the heir of *ex parte paternâ* on the death of the parcener.

It is admitted, that if the deed of partition had been between the parceners themselves, the descent would not be broken: Com. Dig. *Parcener*, (C 15.) But it is said, that inasmuch as one of the parties to the deed was a stranger in blood, whatever was taken from him by the parcener must be taken by purchase. And doubtless this would be so if any thing was taken from him, but we are of opinion that nothing was taken by the parcener from the alienee under the deed. The effect of it was only that the parcener had by it a divided moiety in severalty, discharged from any right in the alienee, instead of an undivided moiety in common, but he had the same estate in the land as before.

The consequence is that a nonsuit must be entered. (*a*)

(*a*) See Chitty on Descent, 1313; *Doe v. Morgan*, 7 T. R. 103; 3 Cru. Dig. *Descent*, c. iii s. 37, et seq.; Watkins on Descent, p. 265, 287, 3d edit.; Vin. Abr. title *Heir*, (W;) *Harris v. Bishop of Lincoln*, 2 P. Wms. 135; *Doe v. Jackson*, 1 B. & C. 448, (8 E. C. L. R. 126.)

CASES
 ARGUED AND DETERMINED
 IN THE
COURT OF KING'S BENCH,
 IN
Hilary Term,
 IN THE
 Seventh Year of the Reign of William IV.—1837.

The Judges in Banc this term were,
 LORD DENMAN, C. J. WILLIAMS, J.
 LITTLEDALE, J. (a) COLERIDGE, J.

In the Bail Court,
 PATTESON, J.

(a) Littledale, J., was unable to attend in Court from Jan. 16th to the end of the term from severe indisposition.

The KING v. The Governors of SANDFORD.—p. 328. (b)

1. Where a charter of Edw. 6, granted to the governors of a corporation the right of nominating and appointing *unâcûm assensu majoris partis inhabitancium* of the vill of S. a chaplain to perform divine service in the said vill:—Held, that a usage for the governors to nominate a chaplain, and to give notice to the inhabitants to meet at a future day, and to assent or dissent to the nomination so made, was not inconsistent with the words of the charter.
2. A decree by the Lord Chancellor, in 1741, had declared the right of voting to be in the inhabitants only paying rates and assessments, and the usage since that decree had been in accordance with it, an election having been made by such inhabitants, at which the votes of non-rated inhabitants were tendered and refused; the Court refused to grant a mandamus for a new election, as the parties applying for it had made out no case to show that the term "inhabitants," used in the charter, had a wider signification.

(a) This case was argued on Jan. 30th in this term.

The KING v. The Wardens and Overseers of the Poor and Inhabitants of ST. SAVIOUR'S, SOUTHWARK.—p. 496.

James I. granted a rectory to a corporation in trust to pay stipends, and to bear all the charges issuing out of the rectory. The 22 & 23 Car. 2 absolved the parishioners from the payment of tithe, and enacted that a rate should be made yearly by the *parish officers* for the payment of stipends, and for church repairs. The 56 Geo. 3, c. lv. enacted that it might be lawful for the *wardens, overseers, and inhabitants* in vestry, to make a rate (to a larger amount) for the

payment of stipends and for *church repairs*. On a vestry refusing to make a rate for the above purposes under the last-mentioned act, the Court issued a mandamus to them to call a vestry and make a rate.

The KING v. The Justices of BUCKINGHAMSHIRE.—p. 503.

1. Where a local act empowered the trustees therein named to raise a sum of money for rebuilding a parish church, and to make a rate for defraying the principal and interest of the sum borrowed, on the "houses, warehouses, shops, buildings, lands, tenements, and hereditaments, *rated or rateable to the poor*," held, that tithes were rateable under these words.
 2. By the act, persons who refused to pay the rate were to be summoned before a magistrate, and if they then refused, the magistrate was authorized and required to grant a distress warrant to levy the amount. A tithe owner having refused to pay the rate, on the ground that tithes were not rateable under the act, the magistrate refused to grant a distress warrant; but the Court of King's Bench issued a mandamus to the magistrate to compel him so to do.
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REX v. GADSBY and others, Overseers and Churchwardens of EDLASTON.—p. 572.

1. A writ of mandamus to the overseers and churchwardens of a parish to make a poor's rate, may be issued out on the prosecution of one of the overseers, where it appeared by affidavit that the other overseer had refused to concur in making the rate, and the 1 Will. 4, c. 21, s. 56, makes no difference as to the parties who may obtain the writ.
2. Where the writ was obtained on an affidavit stating that a rate was necessary for the relief of the poor, and the mandamus recited that no rate had been made for the *necessary* relief of the poor, and that the overseers had refused to make a rate:—Held, that the writ contained upon the face of it sufficient to give the Court jurisdiction.

CASES
 ARGUED AND DETERMINED
 IN THE
COURT OF KING'S BENCH,
 IN
Easter Term,
 IN THE
 Seventh Year of the Reign of William IV.—1837.

The Judges in Banc this term were,

LORD DENMAN, C. J. LITTLEDALE, J.	PATTESON, J. COLERIDGE, J.
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In the Bail Court,
 WILLIAMS, J.

The KING v. HARRIS.—p. 576.

The Court refused a rule nisi for a quo warranto information against the town clerk of a borough, which was moved for in order to contest his right to compensation as a displaced officer under the 5 & 6 Will. 4, c. 76, s. 66.

The KING v. HEWITT.—p. 689. (a)

The same v. the same.

1. A writ *de contumace capiendi* issued to the sheriff of N., reciting a significavit, in which the defendant is described as now or heretofore of a certain parish in the county of K., is bad.
2. Such a writ may be quashed on motion before the return-day; and if the defendant have been arrested on it, it is not necessary to bring him into Court by *habeas corpus*.

(a) This case was decided in Trinity term last, but has been inserted here on account of its subject.

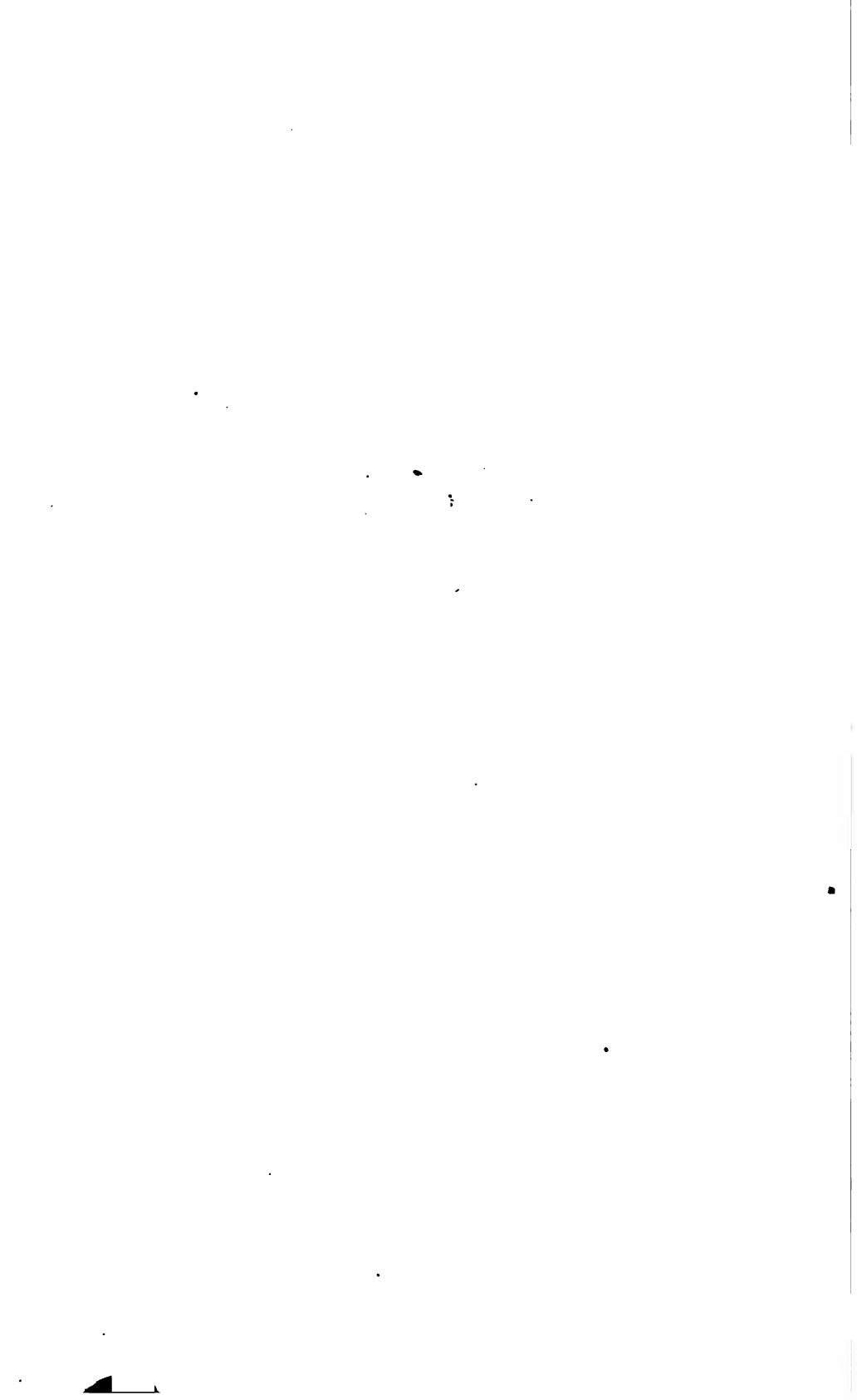
The KING v. The Recorder of POOLE.—p. 756.

A notice of appeal against a borough rate under the Municipal Corporation Act, (5 & 6 Will. 4, c. 76,) must state a grievance, or facts from which a grievance must be necessarily inferred.

A notice in the following form was held insufficient:—"I, F. T., being a burges of the borough of P., and called upon to pay the rate or assessment hereinafter mentioned, do hereby give you and each and every of you notice, that I intend to appeal and shall appeal at the next general quarter sessions of the peace to be holden, &c., against a borough rate, at a meeting of the council of the said borough, held on, &c., ordered and resolved to be raised for payment of the expenses to be incurred in carrying into effect the provisions of the Municipal Act. Dated, &c."

The KING v. The Churchwardens and Overseers of BIGHTON.—p. 774.

Creditors who have advanced money to a parish under the 22 Geo. 3, c. 83, (Gilbert's Act,) are not bound to apply annually for one-twentieth of their principal money, under 43 Geo. 3, c. 110, and therefore the Court will grant a mandamus to the parish officers to pay the principal and interest, although the money had been borrowed thirty years previously, and no instalment of the principal had ever been demanded.



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CONTAINED IN THESE VOLUMES.(a)

Millar

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1. The Court refused to discharge a foreigner out of custody, on the ground that the debt for which he had been arrested was the balance of a demand upon which the plaintiff had received a dividend under proceedings

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BANKRUPTCY.

Whether or not a voluntary payment made by a trader in insolvent circumstances and on the verge of bankruptcy to a particular creditor, is void as being a fraud upon the bankrupt laws, is a question of fact for the jury, depending upon the mind and intention of the party at the time of making the payment, to be collected from the surrounding circumstances. If his condition and conduct be such as to evince clearly a contemplation on the part of the trader that his embarrassments must of necessity end in bankruptcy, the jury will not be warranted in coming to any other conclusion than that the transaction is fraudulent. But, inasmuch as every man has, down to the time of committing the act of bankruptcy, the sole right of dominion over his property, such a payment cannot be held to be a fraudulent preference where the bankrupt at the time of making it appears to entertain a bona fide hope or expectation that he may be extricated from his difficulties without being made a bankrupt. *Gibson v. Boutte*, 574

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Where, in an affidavit to found a motion, the addition of a deponent is omitted, the Court will not inquire whether the facts sworn to by a co-deponent are sufficient to support the application.

When a bastard child becomes chargeable a month before the Epiphany sessions, an application for an order to charge the putative father is not too late at the Easter sessions; *semble*.

The sessions cannot entertain an application, by the overseers of a parish, for an order to charge the putative father of a bastard child, without direct proof of notice to such putative father, notwithstanding his appearance in Court. *Re v. The Justices of Carnarvon*, 615

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The drawer of a bill being asked if he was aware that the bill had been dishonoured, answered: "Yes; I have had a very civil letter from Mr. G. on the subject; and I will call and arrange it." In an action against the drawer—Held, that the above admission relieved the plaintiff from the necessity of proving a regular notice. *Norris v. Salomonson*, 586

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1. Where a statute provides that a Waterworks Company shall make compensation for damage done in executing the works, and these works are restricted to a particular line, damage occasioned by executing the prescribed works is within the proviso, although the property injured be not within the line.
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CONTRIBUTION.

Where a lord of a manor bound by tenure to repair, has repaired a bridge, he may, in an action of assumpsit, recover contribution from a person who holds lands which were parcel of the demesnes at any time whilst the manor was so charged, in proportion to the value of the lands so held.

A surety taken by commission from the Crown, when seised of a manor, is admissible evidence to show what were the demesne lands of the manor at that time. *Dimes v. Arden*, 649

COSTS.

1. On a motion for costs under 43 Geo. 3, c. 46, s. 3, the amount of the verdict is not the criterion by which the discretion of the Court is to be guided. *Graham v. Beaumont*, 577
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3. Costs of proceedings in bankruptcy cannot be set off against damages and costs recovered in an action in this court. *Woodroffe v. Wootton*, 589
4. Upon the trial of issues joined upon several counts, the plaintiff recovers on one of the issues with damages, the defendant having a verdict upon the other issues: the plaintiff afterwards, in pursuance of leave reserved, moves to increase the damages by adding certain sums, and a rule being granted, a special case is stated by the parties, in which the question submitted to the Court is, whether the damages ought to be so increased. Upon the argument of the special case, the Court hold, that the damages ought not to be increased, but direct judgment to be entered on another issue, in addition to that on which the verdict was taken. Held, that the defendant was entitled to the costs of the special case. *Gosbell v. Archer*, 623

COVENANT.

A lease contained a general covenant to repair, and also a covenant, that it should be lawful for the lessor to enter and see the state of the premises, and to give notice in writing of all defects; and that in case the lessee should neglect to repair, it should be lawful for the lessor to enter and repair, and that the lessee should repay the money so expended, together with the next half year's rent; and there was a power of distress for the amount, as in case of rent. The lease also contained a clause of re-entry on the breach of any covenant. The landlord gave the tenant notice to repair a certain portion of the premises before certain specified periods of time, and that in default of his doing so, he should enter and do the repairs himself.

Held, that this notice was a waiver of the right to enter for the breach of the general covenant to repair.

The first lessor assigned to A., from whom the reversion descended to B., who died leaving two sisters coparceners: *quare*, whether one sister can take advantage of a condition

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Quare also, whether the tenant, after payment of rent to her, could dispute her title. *Doe d. De Rutzen v. Lewis*, 661

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To a plea of coverture in the plaintiff, she cannot reply that at the time of the promise declared on her husband had been absent seven years, and that during that period he was not known, nor is he now known, by the plaintiff to be alive. *Lake v. Ruffe*, 651

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A. and B., being seised of land in coparcenary, B. conveyed his moiety to a purchaser in fee. The purchaser and A., the other parcener, made partition by lease and release, and conveyed the whole to H. and his heirs: as to one portion, to the use of B. in fee; as to the other portion, to the use of A. in fee. Held, that A.'s portion remained descendible to his heir ex parte materna. *Doe d. Crosthwaite v. Dixon*, 675

DEVISE.

A. is seised of lands in the hamlet of Dale and of lands in the hamlet and chapelry of Sale, both townships being in the parish of Dale;—Whether by a devise by A. of all his lands in Dale, the lands in Sale necessarily pass, *quare*.

As to the admissibility of certain documentary evidence, to show that Sale has been treated as part of Dale, *quare*.

The register of county electors, in which Dale and Sale are treated as different parishes, is not admissible evidence for the purpose of disconnecting Dale from Sale. *Doe d. Edwards v. Johnson*, 609

ECCLESIASTICAL COURT.

A writ *de contumace capiendo* issued to the sheriff of N., reciting a significavit, in which the defendant is described as now or heretofore of a certain parish in the county of K., is bad.

Such a writ may be quashed on motion before the return-day; and if the defendant have been arrested on it, it is not necessary to bring him into Court by *habeas corpus*. *The King v. Hewitt*, 650

EJECTMENT.

1. In ejectment the declaration was by mistake intitled as of Michaelmas Term, 8 Will. 4, instead of 7 Will. 4. The notice was properly dated:—Held sufficient. *Doe d. Phillips v. Doe*, 589

2. Where in ejectment the consent rule has been made the means of committing a fraud upon the Court, a party being thereby admitted as defendant who is a pauper and has no real interest in the premises, the Court will interpose.

A motion for this purpose may be made, notwithstanding the proceedings have been stayed by a judge's order until delivery by the lessors of the plaintiff of a particular of

the breaches of covenant for which the action is brought. *Doe d. Carr v. Jordan*, 589

ESTATE.

Where by a local act certain trustees are empowered to take and use lands, &c., for the purpose of making a road, "making or tendering satisfaction to the owners or proprietors of all private lands, &c., so taken and used, for the same or for any loss or damage they may sustain thereby,"—satisfaction must be made by the trustees, not to the owners of the inheritance only but to all persons having any estate or interest in the land, who may sustain loss or damage by reason of the lands being taken and used. *Lister v. Lobleigh*, 641

EVIDENCE.

1. Assumpsit against the drawer of a check on a banker. Plea: that the amount for which the check was drawn was illegally won at play; and issue thereon. Unless notice has been given to produce the check, the plaintiff is not bound to produce it. *Reed v. Gamble*, 622
2. Where A. employs a broker, B., to procure a charter-party, on a commission of 5 per cent., to be paid whether the contract be executed or abandoned, A. cannot, under a plea of payment of a smaller sum and non assumpsit ultra, give evidence of a subsequent agreement to accept 2½ per cent. only, on account of the abandonment of the contract.

But where the terms of the original contract are only inferred from the usage of the trade, a conversation in which B. agrees to take 2½ per cent. only, on account of the abandonment of the contract, is admissible, to show that such reduction was, as a contingent reduction, part of the original contract. *Broad v. M'Calmar*, 617

3. Declaration on a contract to demise and deliver possession upon a certain day. Breach: in non-delivery of possession. Plea: that the principal subject-matter of the contract was in the defendant's own occupation, and that he was always ready, willing, and able to demise and deliver possession of the same to the plaintiff: that the residue of the tenements, consisting of a few cottages, were occupied by certain persons as tenants to the defendant, and that at and upon the time of making the agreement, it was agreed that the defendant should not cause the tenants to quit the said cottages, but that on the defendant's completing the said agreement, the tenants should atorn to the plaintiff, and become his tenants; and the plaintiff then discharged the defendant from giving the plaintiff actual possession. In the absence of direct evidence of such an agreement as that set forth in the plea, proof that the plaintiff was aware that the cottages were occupied by weekly tenants, and that he never gave the defendant to understand that he should require to be put in actual possession of them until the very moment when the parties had met for the purpose of concluding the bargain, and when there was not sufficient time left to obtain possession from the tenants, may properly be left to the jury as entitling them to consider whether the conduct of the plaintiff did not show that he had as-

sent to waive a literal performance of the contract, and to accept the occupation of the tenants in lieu of an actual delivery of possession. *Palmer v. Temple*, 633

EXECUTORS.

1. A rule nisi to revive a judgment against the executors of a deceased defendant, must be served on all the executors who have proved the will.
2. Where a rule is served by leaving a copy with a servant, an inquiry should be subsequently made of the servant whether the master has received the copy. *Panter v. Seaman*, 628
3. In sci. fa. by executors to revive a judgment obtained by the testator, all who are named executors in the will may join, though one only have proved.
4. Executors derive their title from the will, and not from the probate. *Scott v. Briant*, 644

HIGHWAY.

1. A charter granted by Queen Eliz. and confirmed by Charles I., exempting the tenants of certain ancient demesne lands from the payment of road money (*chinagium*), does not operate to exempt them from the performance of statute duty on the highways, pursuant to 13 Geo. 3, c. 78; 34 Geo. 3, c. 64; 44 Geo. 3, c. 54, and 54 Geo. 3, c. 109. *The King v. Siviter*, 605
2. 1. An order of Justices under 55 Geo. 3, c. 68, stopping up more than one highway, is void.
2. Such an order, stopping up part only of a highway, is void.
3. Justices have no authority to narrow a highway.
4. *Semble*, justices have no power to stop up a road out of the division or hundred for which they act. *Rex v. The Inhabitants of Milverton*, 670

INSOLVENT.

- A., an insolvent debtor, who, with the permission of B., his assignee, remains in possession, and demises for years to C., may recover the rent from C., notwithstanding a notice from B. to C. requiring the reserved rent to be paid to him, as such assignee.

Semble also, that under a demise by A., mortgagor in possession, to B., A. may recover the reserved rent from B. notwithstanding a notice from C., the mortgagee, requiring B. to pay the rent to him, C. *Partington v. Woodcock*, 624

INTERPLEADER ACT.

An execution creditor served with a sheriff's rule under the Interpleader Act, is not bound to appear where there are no goods liable to his execution. Where, therefore, such creditor appears upon the rule, but does not insist upon any goods being liable to his execution, he is not entitled to the costs of his appearance. *Glazier v. Cooke*, 629

JUSTICE OF THE PEACE.

An act, incorporating a gas company, enacts, that in case any party who shall contract

with the Company for gas, shall neglect, after ten days after demand made, to pay the gas rents, such rents may be recovered by the Company by warrant under the hand and seal of a justice of the peace, and that it shall be lawful for the Company, with such warrant, to levy the sums so due and owing as aforesaid by distress and sale.

Held,—first, that the granting of the warrant was a judicial, and not merely a ministerial act; and that therefore a magistrate could not issue a warrant without a previous summons.

Secondly, that although an officer executing such a warrant might justify under it, yet that the Company who procured the warrant, and interfered in the execution of it, could not.

Seemle, that in no case can a magistrate issue a warrant of distress in the nature of an execution, without previously summoning the party whose goods are to be distrained, in order that he may have an opportunity of being heard.

Seemle, that the 22 Geo. 2, c. 223, s. 1,—which enacts, that in all cases where any act of parliament, to issue a warrant of distress for levying any penalty or sum, the justice may by such warrant order the goods so to be distrained to be sold within a time therein limited, so as such time be not less than four or more than eight days,—applies only where the granting of the warrant is a judicial act. *Painter v. Liverpool Gas Company*, 652

LANDLORD AND TENANT.

1. On a motion by a landlord under the 1 Geo. 4, c. 87, s. 1, the rule should be drawn up on reading the original lease or agreement, or a duplicate or counterpart thereof, and not merely on reading a copy of the lease or agreement.

Where the agreement in such a case appeared to have been stamped after the rule nisi was obtained, the Court discharged the rule; holding that, to entitle him to a rule, the landlord must at the time of moving produce a perfect lease or agreement. *Doe d. Wood v. Doe*, 579

2. A. lets to B. a furnished house, at a certain rent payable in advance, from a certain future day, and agrees that it shall be furnished suitably for a school:—The suitable furnishing of the house is a condition precedent to the right to demand the rent.

If B. enters, and the house is not so furnished, A. cannot distrain for the rent.

Whether a verbal representation that the house will be suitably furnished, forms part of the contract or not, is a question for the jury. *Mechelen v. Wallace*, 639

3. In December, 1819, the testator's father was a tenant of a farm belonging to the plaintiff till the following Lady-day. The plaintiff's steward, in the month of December, proposed to let the farm, and read from a printed paper the terms of letting. The testator was present and assented to those terms, agreeing to succeed his father at Lady-day, but no writing was signed. He did then enter and continued tenant till his death, since which the defendants (his executors) occupied and paid rent. At the foot of the printed paper of terms was written a memorandum, not

signed by either party, but by the attorney of the plaintiff, who was present at the time of the letting. This memorandum commenced in the following terms: "A. B. as agent of the plaintiff, agreed to let, and C. D. agreed to take," and went on to state the farm, rent, and when payable; that the term was for one year certain, from Lady-day next, and so from year to year, until a due notice to quit was given. It was held that this agreement, followed by entry and payment of rent, created a tenancy, upon the terms contained in the printed paper and memorandum, and that they might be referred to by the attorney, (the witness,) as showing what the terms of the demise were. *Bolton v. Tomlin*, 670

LOCAL ACT.

1. Where a local act empowered the trustees therein named to raise a sum of money for rebuilding a parish church, and to make a rate for defraying the principal and interest of the sum borrowed, on the "houses, warehouses, shops, buildings, lands, tenements, and hereditaments, rated or rateable to the poor," held, that tithes were rateable under these words.

2. By the act, persons who refused to pay the rates were to be summoned before a magistrate, and if they then refused, the magistrate was authorized and required to grant a distress warrant to levy the amount. A tithe owner having refused to pay the rate, on the ground that tithes were not rateable under the act, the magistrate refused to grant a distress warrant; but the Court of King's Bench issued a mandamus to the magistrate to compel him so to do. *The King v. The Justices of Buckinghamshire*, 678

MANDAMUS.

1. Upon the trial of an indictment at the quarter sessions, that Court is the sole judge of the propriety of the entry of the verdict.

Where, therefore, upon a special finding by the jury, amounting to an acquittal, the chairman directs a verdict of guilty to be entered, the Court of K. B. will not grant a mandamus requiring the minute of the verdict to be altered according to the fact.

The only course open to the prisoner is to apply to the crown for a pardon. *The King v. The Justices of Suffolk*, 605

2. A mandamus will issue to compel one of the churchwardens and one of the overseers to concur in making a rate for the relief of the poor, where they refuse to consent unless the rate expressly stated that certain inclosures are within a particular district of the parish.
3. The rule for a mandamus, to concur in making a rate for the relief of the poor, is absolute in the first instance. *The King v. The Churchwardens, &c., of Edlaston*, 669
4. A writ of mandamus to the overseers and churchwardens of a parish to make a poor's rate, may be issued out on the prosecution of one of the overseers, where it appeared by affidavit that the other overseer had refused to concur in making the rate, and the 1 Will. 4, c. 21, s. 56, makes no difference as to the parties who may obtain the writ.
5. Where the writ was obtained on an affidavit stating that a rate was necessary for the relief of the poor, and the mandamus recited

that no rate had been made for the necessary relief of the poor, and that the overseers had refused to make a rate:—Held, that the writ contained upon the face of it sufficient to give the Court jurisdiction. *Rez v. Churchwardens of Edlston*, 679

6. James I. granted a rectory to a corporation in trust to pay stipends, and to bear all the charges issuing out of the rectory. The 22 & 23 Car. 2 absolved the parishioners from the payment of tithe, and enacted that a rate should be made yearly by the parish officers for the payment of stipends, and for church repairs. The 56 Geo. 3, c. lv., enacted that it might be lawful for the wardens, overseers, and inhabitants in vestry, to make a rate (to a larger amount) for the payment of stipends and for church repairs. On a vestry refusing to make a rate for the above purposes under the last-mentioned act, the Court issued a mandamus to them to call a vestry and make a rate. *The King v. The Wardens of St. Saviour's, Southwark*, 678
7. Creditors who have advanced money to a parish under the 22 Geo. 3, c. 83, (Gilbert's Act,) are not bound to apply annually for one-twentieth of their principal money, under 43 Geo. 3, c. 110, and therefore the Court will grant a mandamus to the parish officers to pay their principal and interest, although the money had been borrowed thirty years previously, and no instalment of the principal had ever been demanded. *The King v. The Churchwardens of Brighton*, 681
8. Where the names of certain burgesses, duly qualified in other respects, were objected to, and expunged from the burgess-lists, by the mayor and assessors, on revision, on account of the non-payment of the shilling required by 2 Will. 4, c. 45, s. 56, the Court of K. B. considered that they had not the power to grant a mandamus to insert the names. *The King v. The Mayor of Hythe*, 670
9. A decree by the Lord Chancellor, in 1741, had declared the right of voting to be in the inhabitants only paying rates and assessments, and the usage since that decree had been in accordance with it, an election having been made by such inhabitants, at which the votes of non-rated inhabitants were tendered and refused; the Court refused to grant a mandamus for a new election, as the parties applying for it had made out no case to show that the term "inhabitants," used in the charter, had a wider signification. *Rez v. The Governors of Sandford*, 678

MASTER AND SERVANT.

Plaintiff, a domestic servant, entered into the defendant's service on the 19th November. On the fifteenth January, her mistress caused her to be taken before a magistrate on a charge of stealing some small articles of plate: the magistrate remanded her till the 20th, when she was again brought up, and discharged. On the 22d, the plaintiff went to demand her clothes and wages, including 12 s. in lieu of a month's warning. The defendant tendered 2l. 2s. for the two months' actual service, but refused to pay the additional guinea:—Held, that, inasmuch as the placing the plaintiff in custody on a charge that was afterwards abandoned was no dissolution of the contract of hiring, the plaintiff

was under the circumstances entitled to wages for the third month, which had been entered upon; and that the whole might be recovered under the common count for work and labour. *Smith v. Kingsford*, 574

NEW TRIAL.

After verdict for the plaintiff in debt on bond, (the defendant not appearing at the trial), the Court granted a new trial on the ground that in the issue delivered the pleas were not dated, pursuant to the rule of Hilary Term, 4 Will. 4. *Worthington v. Wigley*, 577

OUTLAWRY.

The defendant mortgaged to one J. P. for 3000l. certain fee-farm rents. The principal being unpaid, and 450l. being due for interest upon the mortgage, a written contract was entered into between the defendant and J. P. for the sale to the latter of the rents in question for 3785l. Pending the investigation of the defendant's title J. P. died, leaving the plaintiff her executor and residuary legatee. After the draft conveyance had been settled and approved, the defendant being abroad, the plaintiff, without any notice either to the defendant or to his attorney, (though he knew that the defendant was abroad and that he had an attorney acting for him here,) made affidavit that the defendant was indebted to him as the executor of J. P. in the sum of 3550l. and upwards, for principal and interest, and sued out a capias, and caused it to be delivered to the sheriff with directions to return it non est inventus, and thereupon caused the defendant to be outlawed.—The Court reversed the outlawry with costs. *Pigou v. Drummond*, 599

PAYMENT.

Quære whether in an action of tort against the sheriff, by assignees of a bankrupt, for seizing goods of the bankrupt, the defendant may, without specially pleading them, give in evidence payments necessarily made by him out of the proceeds, in reduction of the damages. *Goldsmid v. Raphael*, 577

PLEADING.

In assumpsit for money paid to the use of the defendants, they pleaded specially circumstances showing that the policy of insurance in respect of which the payments were made had been so framed as to be utterly unavailing. Upon special demurrer, on the ground, amongst others, that the plea was argumentative and amounted to the general issue—The Court inclined to think the plea good, but allowed the plaintiff to withdraw his demurrer and reply de novo, without costs. *Cole v. Le Souef*, 571

POOR.

1. Held, per Coleridge, J., in the Outer Court, that under 4 & 5 W. 4, c. 76, s. 72, an application for an order on the putative father of a bastard child need not, in all cases, be made to the first sessions after the child becomes chargeable, but must be made to the first sessions at which it can be made with

effect. *The King v. The Justices of Oxfordshire*, 644

2. A poor person legally settled in the parish of A., who having come into the parish of B. animo morandi, there meets with an accident, such as to make it dangerous actually to remove him, or even to take him before a justice to be examined as to his settlement, and becomes chargeable in consequence thereof, cannot be regarded as *casual poor*; and an order for his removal may be made and suspended under 35 Geo. 3, c. 101, s. 1 & 2.

And such order being so made and suspended, the parish of A. is bound to pay to the officers of the parish of B. expenses incurred by them by curing and maintaining the pauper during the suspension of the order of removal.

But if such poor person had not come into the parish of B., animo morandi, he would have come within the description of *casual poor*, and would not have been removable.

So, if the poor person (e. g. a foreigner) had no settlement elsewhere. *Semble. The King v. Inhabitants of Oldland*, 650

PRACTICE.

1. A demand ofoyer must correctly describe the parties to the cause. *Poole v. Coates*, 580
2. A notice to plead need not be dated: consequently, it will not be vitiated by an erroneous date. *Wyatt v. Macdonald*, 581
3. *Semble*, that no rule to plead several matters is necessary in the case of pleas added under a judge's order. *Monk v. Shenstone*, 579
4. On demurrer to a replication, the Court will not permit the plaintiff to attack the defendant's plea, unless the point has been marked for argument, pursuant to the rule of Hilary Term, 4 Will. 4, s. 2. *Bayley v. Homan*, 577
5. A rule nisi having been granted to reduce the damages, the Court allowed the plaintiff to enter up judgment, and issue execution for that part of the damages which was unobjected to, on his electing to forego the rest. *Hellings v. Young*, 580
6. It seems that, since the new rules, (Hilary, 4 Will. 4, s. 15,) the plaintiff cannot be ruled to enter the issue. *Wilks v. Dodd*, 580
7. In trover for goods, the defendant was allowed to plead—first, not guilty.—secondly, that the plaintiffs were not lawfully possessed of the goods—and two other pleas alleging a deposit of the goods in question in the hands of the defendant as a security for a bill discounted by a third person. *Jawllery v. Britton*, 594
8. In action by five plaintiffs, the Court refused to allow satisfaction to be entered on the judgment roll, on a warrant of attorney signed by four of them only, although it was sworn that the other plaintiff had gone to settle in America, and that the damages were merely nominal. *Davis v. Jones*, 586
9. The Court will not deprive the plaintiff of the fruits of a judgment obtained by him on a special case argued and determined after the death of the defendant, though four terms have elapsed between the time of his obtaining and of his entering up judgment, unless it be shown that the defendant's estate had suffered prejudice by the delay. *Green v. Cobden*, 598
10. Where a *causso* (which has been made a *remanet*) is tried before the sheriff on a day

subsequent to the return day of the writ of trial, the Court will amend the writ. *Sherman v. Tinsley*, 587

11. To warrant a motion for an attachment against a party for non-performance of an award, the order of Nisi Prius or the submission must appear to have been previously made a rule of court. *The Mayor of Bath v. Pinch*, 587
12. It is not absolutely necessary that affidavits used on motion under the 3 & 4 Will. 4, c. 74, s. 91, should be entitled "In the Common Pleas." *In re Bates*, 596
13. An affidavit to hold to bail stated that the defendant was indebted to the deponent in a certain sum "for materials found and provided, goods sold and delivered, and work and labour done and performed by the deponent to and for the use and benefit of the defendant, and at his request:—Held, sufficient. *Lucas v. Goodwin*, 588
14. To entitle a plaintiff to a *distringas* upon a writ of summons not personally served, it is not sufficient to show that unsuccessful attempts were made to serve the defendant at his residence on three occasions, and that on the second a copy of the writ was left, and referred to on the third.

The copy of the writ must be left on the third visit. *Mason v. Lee*, 608

15. Where a rule is discharged, the party is not entitled to a second rule to the same effect, upon affidavit stating additional facts, which the party might have presented to the Court on the first motion.
16. Where reasonable diligence has been used to obtain the true Christian name of a defendant, the plaintiff, upon a motion to set aside proceedings for irregularity, on the ground of misnomer, is protected by Reg. H. 2 Will. 4, I. 32.
- But where the defendant was not *consuant* of the inquiries made respecting his name, a rule for setting aside the proceedings for irregularity, on the ground of misnomer, was discharged *without costs*. *Rosset v. Hartley*, 618
17. In discussing a rule nisi for an attachment against the sheriff for an insufficient return to a writ, the Court will not take cognisance of the return unless an office copy be produced, verified by affidavit, although there be an affidavit by a party as to his belief that no sufficient return has been made. *Wilton v. Chambers*, 621
18. A cause in which the defendant had been held to bail for 52*l.* is referred to an arbitrator, to whom also the question of costs generally, and of costs under 43 G. 3, c. 46, is referred: An award that 15*l.* 17*s.* was due to the plaintiff at the time when he held the defendant to bail, and that the verdict shall stand for that amount, and that the plaintiff had reasonable and probable cause for holding the defendant to bail, (without saying for what amount,) and that the defendant shall pay the costs of the cause, is sufficient. *Swell v. Burne*, 624

PRISONER.

1. The 2 Will. 4, c. 39, s. 8, has not altered the mode of charging prisoners in execution. *Whitmore v. Binns*, 599
2. The 2 Will. 4, c. 39, s. 8, has not altered the mode of charging prisoners in execution. *Stoken v. Wedderburne*, 599

RATE, BOROUGH.

A notice of appeal against a borough rate under the Municipal Corporation Act, (5 & 6 Will. 4, c. 76,) must state a grievance, or facts from which a grievance must be necessarily inferred.

A notice in the following form was held insufficient:—"I, F. T., being a burgess of the borough of P., and called upon to pay the rate or assessment hereinafter mentioned, do hereby give you and each and every of you notice, that I intend to appeal and shall appeal at the next general quarter sessions of the peace to be holden, &c., against a borough rate, at a meeting of the council of the said borough, held on, &c., ordered and resolved to be raised for payment of the expenses to be incurred in carrying into effect the provisions of the Municipal Act. Dated, &c." *Rea v. The Recorder of Poole*, 680

RULE TO COMPUTE.

A rule to compute was refused in an action of covenant for non-payment of rent and land-tax. *Sed Quere. Morris v. Thompson*, 587

SCIRE FACIAS.

The Court will permit judgment to be signed on a *sci. fa.* after eight days from the return (r. 81, H. T. 2 Will. 4,) where the defendant resides abroad, he having had *reasonable notice of the proceeding.* *Wheatherhead v. Landles*, 577

SEPARATION DEED.

A deed of separation, in which, after reciting that differences subsisted between the husband and wife, and that they had agreed to live apart, and that the husband had agreed to give to trustees for the benefit of the wife a life annuity for her separate maintenance, it was witnessed, that in consideration of 10*l.* paid by each of the trustees to the husband, and of the covenants thereinafter contained, the husband granted to the trustees a life annuity of 200*l.* for the benefit of the wife, and in which there were (amongst others) a covenant by the trustees to indemnify the husband from the debts of the wife, need not be enrolled under 53 Geo. 3, c. 141, s. 2. *Carter v. Smith*, 648

SET-OFF.

A debt from the testator cannot be set off in an action for money had and received to the use

of the plaintiff as executor. *Schofield, Administratrix, &c., of Lane, deceased, v. Corbett*, 649

SHIPPING.

In assumpsit for demurrage upon an agreement in the nature of a charter-party, non-compliance by the plaintiffs with the provisions of 3 & 4 W. 4, c. 52, s. 108, requiring that previously to the unloading of goods carried coastwise, a written notice of the ship's arrival, with goods signed by the master, shall be given to the collector or controller of customs, by the master, owner, wharfinger, or agent of such ship, and proper documents obtained, should be specially pleaded, and cannot be up as a defence under non assumpsit. *Alcock v. Taylor*, 639

SIMONY.

The sale of the advowson of a church which is full, is not simoniacal by reason of the incumbency being at the time of sale *voidable* at the election of the patron.

And a conveyance under such sale will pass the right of immediate presentation. *Alston v. Atlay*, 652

STOCK-JOBBER.

The stock-jobbing act, 7 Geo. 2, c. 8, is confined to the stocks of this country.

Time bargains in foreign funds are not illegal or void at the common law.

If they were so, semble that the broker employed in effecting them would still be entitled to sue for his commission in respect thereof. *Wells v. Porter*, 563

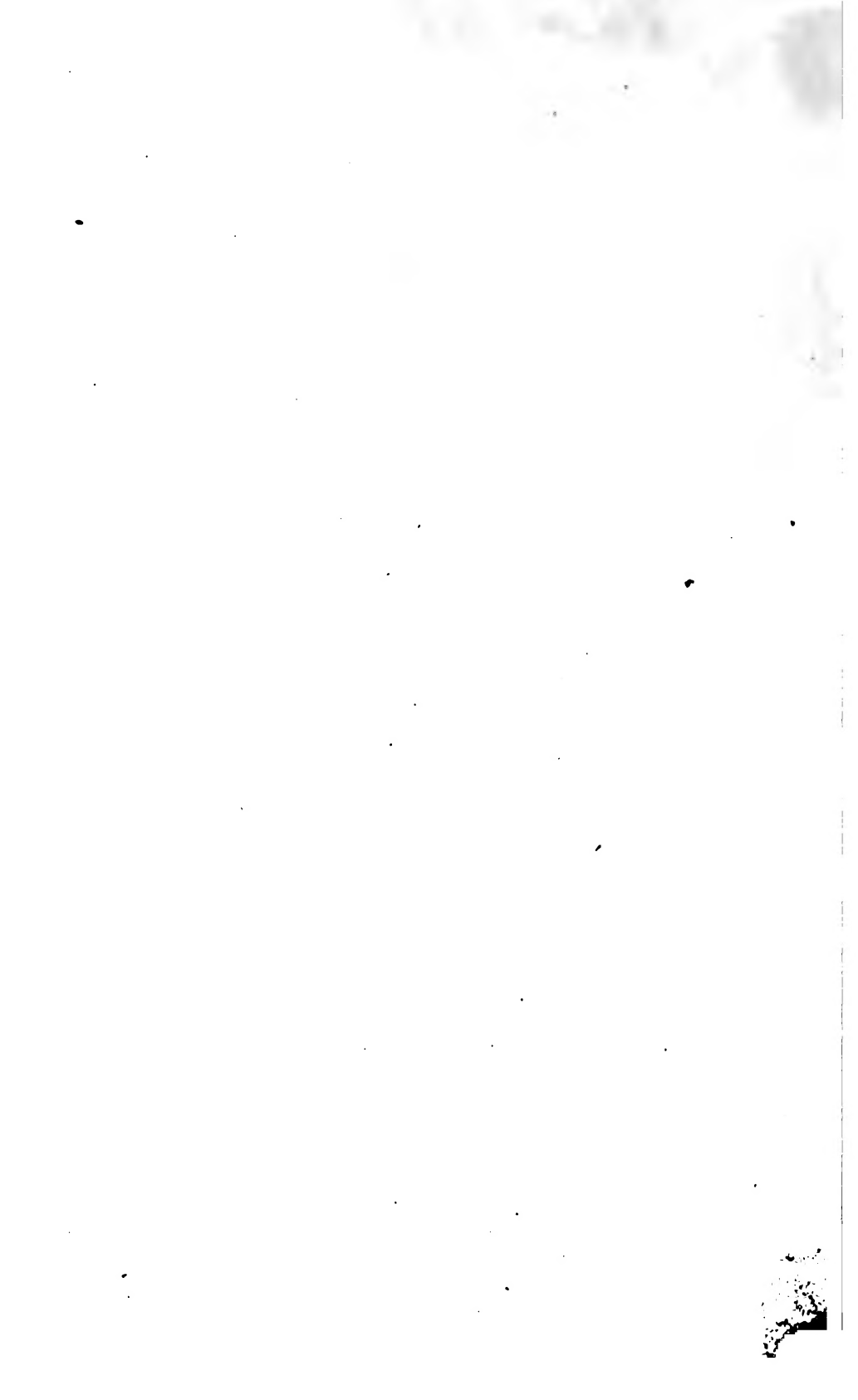
TITHES.

A corn rent given by an act for enclosing lands and extinguishing tithes to the rector in lieu of tithes, is rateable to the relief of the poor unless there be an express clause of exemption.

Where, therefore, a commissioner appointed under such an act is directed to ascertain the yearly value of all the tithes, moduses, &c., and in making such valuation, the tithes of all lands are "to be deemed equal in value to one-fifth part of the annual *net* value of such lands," and a corn rent equal to the value of the tithes is to be settled and charged in due proportions upon the lands, lands, and to be payable to the rector by the occupiers of the lands. The rector is liable to be rated in respect of such corn rent. *The King v. Inhabitants of Wistow*, 651









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